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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 599.

THE NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSISSIPPI EX REL. THE DISTRICT ATTORNEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED SEPTEMBER 25, 1883.

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1 UNITED STATES OF AMERICA,
Southern District of Mississippi:

Pleas and proceedings had and done at a regular term of the circuit court of the United States, fifth circuit, southern district of Mississippi, begun and held pursuant to law in the court room of said court in the city of Jackson, in said district, on the first Monday of November, A. D. 1882. Present and presiding the Honorable R. A. Hill, United States district judge for Mississippi.

THE STATE OF MISSISSIPPI
vs.
THE NEW ORLEANS, CHATTANOOGA RAILROAD COMPANY.

Be it remembered that heretofore, to wit, on the 9th day of April, A. D. 1881, a transcript from the record of proceedings had in the circuit court of Hancock county, Mississippi, was filed in the office of the clerk of this court, and is in the words and figures following, to wit:

2 THE STATE OF MISSISSIPPI, } *ss:*
Hancock County, }

In the Circuit Court of said County. At the Special June Term, A. D. 1875.

THE STATE OF MISSISSIPPI
vs.
NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY.

Be it remembered that at the above-stated term of said court came on to be heard the above-entitled cause upon petition, answer, &c., the papers and proceedings of which are couched in the words and figures following, to wit:

"*Copy of Petition.*"

THE STATE OF MISSISSIPPI, *Hancock County:*

In the Circuit Court. In Vacation.

To the Honorable Green C. Chandler, judge of the first circuit court district of said State sitting in said county:

The petition of Daniel B. Seal, district attorney for the said circuit court district, who sues on behalf of the State aforesaid, respectfully showeth: That the New Orleans, Mobile and Chattanooga Railroad Company, a corporation incorporated by an act of the Legislature of the State of Alabama, was incorporated and granted certain
3 corporate privileges and powers in the State of Mississippi by an act of the Legislature of the said State of Mississippi, entitled An act in relaterie "to the New Orleans, Mobile and Chattanooga Railroad Company, a corporation of the State of Alabama, and authorizing and empowering said company to exercise and enjoy the corporate powers and franchises in the State of Mississippi, approved Feb. 7th, 1867." That by said act of incorporation said

railroad company was empowered and authorized to construct, maintain, use, and manage a railroad upon a course or route deemed most proper and best adapted from the line between the States of Louisiana and Mississippi, and thence to any point on the line between said States of Alabama and Mississippi, said railroad to be constructed to extend from the city of Mobile, in the State of Alabama, to the city of New Orleans, in the State of Louisiana, and by said act of incorporation said railroad company was authorized and empowered to construct and maintain its railroad over and
4 across any of the waters of this State on the line of the same: Provided, however, that in the central portion of the channel of Pearl river, of the Bay of St. Louis, of the Bay of Biloxi, and of the East Pascagoula river, and in each of them said company should construct and maintain a draw-bridge, which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, and said company, after the construction of the said draw-bridges, shall at all times thereafter provide that said draw-bridges shall be opened for the passage of any and all vessels seeking to pass through the same without unnecessary delay: Provided, however, that in case the company shall locate the line of their road across the channel of the Rigolet at a point south of or below the principal entrance of Pearl river into the Rigolet, there the said company shall not be required to construct a draw-bridge across any bayou leading into Pearl river, or across any small pass or
5 mouth of said river. It is also provided that such part of this section as relates to Pearl river, if the line of the road shall be located across the said river at a point where it constitutes the boundary line between the State of Mississippi and the State of Louisiana, shall not take effect until the State of Louisiana has consented to and authorized the same or said company has built such a bridge across said Pearl river for its said railroad, as shall be in accordance with this section, and also with any authority or powers granted to said company by the said State of Louisiana in the premises, and such draw-bridge may be built in the centre of the channel of said Pearl river, or in that portion of the same within the territory of the State of Louisiana or of this State, as most convenient for public use."

Your petitioner further showeth that the said railroad company, under and by virtue of their said charter, proceeded to con-
6 struct their said railroad through the State of Mississippi, passing through the counties of Hancock, Harrison, and Jackson, and have maintained the same since the year A. D. 1871; but said company failed and neglected to construct and maintain a draw-bridge in the central portion of Pearl river, or any draw-bridge in that river, but constructed a permanent bridge without any draw, which obstructs the navigation of said river and is a public nuisance, to the great damage and detriment of the people of the State of Mississippi.

Your petitioner further showeth that Pearl river is a navigable river by the common law and the law of nations, in which the tide ebbs and flows for twenty or thirty miles above said bridge, and is

navigable for steamboats for more than two hundred miles, and has been navigated from time immemorial; that said railroad bridge is located about one mile from where said river debouches or empties into Lake Borgne, an arm of the sea, and vessels drawing nine or ten feet of water can enter into said lake by Cat Island pass,
7 and through it into Pearl river, and ascend said river fifteen or twenty miles to the town of Gainesville, in said county of Hancock, but for the obstruction caused by said bridge; that Pearl river is the boundary between the State of Mississippi and the State of Louisiana, and that neither of said States have a right to obstruct the free navigation of said river, or to authorize or empower others to do so; but, by the act of Congress entitled "An act to enable the people of the western part of the Mississippi territory to form a constitution and State government, and for the admission of said State into the Union on an equal footing with the original States, passed March 1st, 1817," it was, among other things, provided "That the Mississippi river and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, shall be common highways and forever free as well to the inhabitants of said State as to other citizens of the United States," which was a condition on which the State of Mississippi was admitted into the Union, and an
8 engagement on the part of the United States that all of the navigable rivers and waters emptying into the Gulf of Mexico should forever be free to all the inhabitants of the State of Mississippi, and said Pearl river does lead and empty into the Gulf of Mexico.

Your petitioner avers that the construction and maintaining said bridge across said Pearl river is [an oppressive] and public nuisance and obstruction to the navigation of said Pearl river, and causes a permanent and irreparable injury and damage to the State of Mississippi and to citizens and inhabitants thereof, as well to the commerce of the United States and the world, and is a direct and palpable violation of the law and of the charter of said railroad company; and your petitioner avers that the said railroad company are legally bound and required by the terms of its charter, as well as by the common law, to remove and abate such nuisance, and to construct and maintain a draw-bridge in the central portion of said Pearl river, which, when open, shall give a clear space for
9 the passage of vessels of not less than sixty feet in width, and after the construction of said draw-bridge, at all times thereafter provide that said draw-bridge shall be opened for the passage of any and all vessels seeking to pass through the same without un-ecessary delay.

Your petitioner further shows that the main stream of Pearl river, which is the boundary line between the States of Mississippi, does not empty into the Rigolets, but that there is a communication from Pearl river into the Rigolets through a bayou and lake, in which there is not more than six or six and a half feet of water, three feet less than in the mouth of Pearl river.

Your petitioner therefore prays for a writ of mandamus to be issued out of and under the seal of said circuit court, directed to New Orleans, Mobile and Chattanooga Railroad Company and to

president and directors thereof, directing and commanding said company to abate said nuisance, and to construct and maintain in the central portion of the channel of Pearl river, where said railroad crosses the same, a draw-bridge which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, and after construction of the said draw-bridge, at all times provide that said draw-bridge shall be opened for the passage of any and all vessels seeking to pass through the same without un-ecessary delay, and for general relief, and that petitioner recover his costs in this behalf expended, and that said writ be made returnable before your honor in vacation, in not less than twenty nor more than thirty days, at the court-house of Hancock county, in the State of Mississippi.

(Signed) D. B. SEAL, *Dist. Att'y.*

(Signed) W. A. CHAMPLIN, *Of Counsel.*

THE STATE OF MISSISSIPPI, *Hancock County:*

Personally came and appeared before me, Green C. Chandler, judge of the first judicial circuit court district of said State, Daniel B. Seal, who, being by me first duly sworn, deposeth and saith that the matters and things set forth and stated in the foregoing petition are true to the best of his knowledge and belief, and that a speedy trial of said writ is necessary to the ends of justice, and that a delay to the next ensuing term of said circuit court will be productive of great injury to the petitioner.

(Signed) D. B. SEAL.

Sworn to and subscribed before me, this 31st day of May, 1875.

(Signed) G. C. CHANDLER,
Judge Circuit Court.

To the clerk of the circuit court of Hancock county, in the State of Mississippi:

Let a writ of mandamus issue as prayed for in the foregoing petition, returnable before me at the court-house of said county, in the city of Bay St. Louis, on the 24th day of June, A. D. 1875, on which day is ordered that said writ and cause shall be tried before me in vacation on that day and at that place.

(Signed) G. C. CHANDLER,
Judge 1st Circuit Court Dist.

Which petition is marked: Filed June 1st, 1875, and signed P. J. Murphy, clerk.

Upon which also appears the following endorsement of sheriff:

Received in office this the 2nd day of June, A. D. 1875, and duly executed the same by delivering to M. G. Beers, agent of the N. O., M. & Chat. Railroad Company, a true copy of the within mandamus, this the 2nd day of June, A. D. 1875.

(Signed) JNO. J. SAUCIER, *Sh'ff.*

"Copy of Writ."

THE STATE OF MISSISSIPPI, *Hancock County,* } *ss:*

To the New Orleans, Mobile and Chattanooga Railroad Company and the president and directors thereof:

You are hereby commanded to construct and maintain in the central portion of the channel of Pearl river, where said railroad crosses the same, a draw-bridge which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, and after construction of the said draw-bridge, at all times
13 provide that said draw-bridge shall be opened for the passage of any and all vessels seeking to pass through the same without unnecessary delay, and for general relief.

You are hereby commanded to be and personally appear before his honor, Green C. Chandler, judge of the 1st judicial circuit court district, sitting in vacation at the court-house thereof, in the city of Bay St. Louis, on Thursday, the 24th day of June, A. D. 1875, then and there to show cause, if any they have or can, why the said writ of mandamus should *preemptiorily.*

Witness the Hon'ble Green C. Chandler, judge of the 1st judicial district of the State of Mississippi, the 1st Monday of May, A. D. 1875.

Issued the 2nd day of June, A. D. 1875.

[L. S.] (Signed) I. J. MURPHY, *Clerk.*

To the sheriff of Hancock county to execute and return.

Upon which writ the following returns of the sheriff appear, to wit:

Rec'd in office this 2nd day of June, A. D. 1875.

(Signed) JNO. J. SAUCIER, *Sh'ff.*

14 Executed this writ this 2nd day of June, A. D. 1875, upon Wm. L. Beers, station agent and legal agent of said N. O., M. and Chatt. R. R. Co. at Bay St. Louis, in person, by handing to him a true copy thereof.

(Signed) JNO. J. SAUCIER, *Sh'ff.*

Copy "Answer of Defendants."

THE STATE OF MISSISSIPPI, *Hancock County:*

In the Circuit Court of the First Judicial District, sitting in the County of Hancock aforesaid. June Term, 1875.

THE STATE OF MISSISSIPPI, on Petition of District Atto.,

vs.

NEW ORLEANS, MOBILE & CHATTANOOGA RAILROAD COMPANY.

The New Orleans, Mobile and Chattanooga Railroad Company, now designated as the New Orleans, Mobile & Texas Company, a corporation of Alabama, & the new designation being according to

a law of that State adopted in 1871, by their attorney comes & for answer to the petition of the said plaintiff says: That a man-
15 damus ought not to be granted, for the reason that the case, as made in the petition, does not justify or warrant the employment of the said writ, & that this defendant ought not to be required to answer in reference to the prayer for the said writ; and the said corporation avers that the General Assembly of the State of Alabama, on the 24th November, 1866, passed an act to incorporate the New Orleans, Mobile & Chattanooga Railroad Company with authority to make a railroad to connect the cities of Mobile and New Orleans, for that purpose to obtain franchises & privileges for the States of Louisiana & Mississippi to construct, maintain, & operate their railroad in those States, & also for the United States to sanction and to maintain them in the enjoyment of the same; and the defendant avers that the Legislature of the State of Mississippi did enact a statute relative to the said corporation, and authorizing & empowering it to exercise corporate powers & franchises in the State of Mississippi, and did grant to the said corporation
16 rights and privileges & franchises by the said statute approved 7th February, 1869, & which is referred to in the said petition filed in this cause.

2nd. The defendant, for further answer, says that in the sixth subsection of the second section of that act the location of the road in the State of Mississippi, and the designation of the mode & places for making bridges, is declared. It is provided "That the said corporation is authorized and empowered to construct and maintain its railroad over and across any of the waters in this State on the line of the same by bridges: *Provided, however*, That in the central portion of the channel of the Pearl river, of the Bay of St. Louis, of the Bay of Biloxi, and of the east of the Pascagoula river, and in each of them, said company shall construct and maintain a draw-bridge which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, "and said company, after the construction of said draw-bridge, shall at all times there-
17 after provide that said draw-bridge shall be opened for the passage of any and all vessels seeking to pass through the same without unnecessary delay;" the defendant avers that as to all of the streams mentioned in the foregoing clause of the said enactment there has been exact performance by the company, except in reference to the central portion of the channel of Pearl river. But the clause succeeding that above quoted explains and controls in reference to that river, and supplies the reason for the act of the company.

3. The act proceeds: "Provided, however, that in case the company shall locate the line of their road at a point *south* or *below* the principal entrance of the Pearl river *into the Rigolet*, there the said company *shall not be* required to construct a draw-bridge across any small pass *or mouth* of said river." It is also provided that such part of this section as relates to Pearl river, if the line of the road shall be located across the said river at a point where it con-
18 stitutes the boundary line between the State of Mississippi &

the State of Louisiana, shall not take effect until the State of Louisiana has consented to and authorized the same, or said company has built a bridge.

4. And the defendant avers that the said company did locate the line of their road across the channel of the Rigolet at a point south and *below* the principal entrance of Pearl river into the Rigolets, and did construct the bridge across the Rigolet with the draw-bridge as prescribed in the said act, which has been maintained from that date. And the defendant further avers that the General Assembly of the State of Louisiana, in an act adopted by the same, relative to the New Orleans, Mobile & Chattanooga Railroad Company, a corporation of the State of Alabama, and authorizing and empowering said company to exercise and enjoy corporate powers and franchises in the Ssate of Louisiana, "approved 19 August, 1868," did provide

"That in case the company shall locate their road across the
19 Great Rigolets at a point south or below the principal entrance of Pearl river into the Great Rigolet, then the company shall only be required to construct one draw-bridge, which shall be in the channel of the Great Rigolets, as hereinbefore named."

And the defendant further avers that thus by the terms of the acts of the General Assembly of the two States of Mississippi & of Louisiana the said railroad company did locate and construct their railroad and bridges according to the terms they prescribed & dictated, and that they dispensed with bridges with draws at the entrances of the Pearl river into Lake Borgne in any other branch or place that that which come unto the Great Rigolet, & for the reason that the branches did communicate with that great channel & through that with Lake Borgne.

5. And the said defendant further answers & avers that the surveys of the said railroad were made and the work done in the years 1868 & 1869 conformably to the power & the authority of the
20 States of Alabama, Mississippi, & Louisiana, and for the year last aforesaid the said railroad has been & is a great public highway through these States, & connecting them with other portions of the United States, & that the Congress of the United States, in view of the magnitude of the work & the costs of its construction, & to expidite it, did, by an act, entitled "An act" to establish & declare the railroad & bridges of the New Orleans, Mobile & Chattanooga Railroad Company, as hereafter constructed, a post road, & for other purposes, approved March 2d, 1868, authorized and empowered the said corporation to construct, build, and maintain bridges over and across the navigable waters of the United States on the route of said railroad between New Orleans & Mobile for the use of the company, & the passage of its engines, cars, trains of cars, passengers, mails, & merchandise, & that the railroad & its bridges, when completed and in use, were to be held & deemed *lawful structures* & a *post road*. The said act required draw-bridges on
21 the Pascagoula, the Bay of Biloxi, the Bay of St. Louis, & the Great Rigolet, but none on the Pearl river, and Congress reserved a power to amend or to alter the act so as to prevent or to remove material obstructions.

6. The defendant further avers and declares that the said bridge was made under the power and authority thus granted by the United States and the States of Louisiana and Mississippi & Alabama; that the construction of the said bridges has been costly, amounting to $20,000 & upwards; that the maintainance of a draw-bridge would entail a great cost, and that the corporation is authorized to maintain it under the act of Congress aforesaid, & that the same is a *lawful structure* and a *post road*, and that so long as the same is thus authorized that it is not competent for the court to overturn it or abate it as illegal or a nuisance.

7. And the defendant further answers & declares that the traffic through the pass of the Pearl river mentioned in the petition at and before the adoption of the acts aforesaid, & since that
22 time, has been inconsiderable, and that the principal portion of the trade had gone to New Orleans and along the other passes of the said river, & that the prospect of another mode of access to the east & west from that section of the State was encouraged by the State, and covered the adoption of the act of the Legislature of the State of Mississippi referred to in the petition, and approved the 7th February, 1867, whereby the said company was re*leared* from the making of a draw-bridge over the eastern branches of the Pearl river, or the *mouth* of the same, and of the adoption of the act of Congress, being the act approved the second day of March, 1868, whereby & wherein the said bridges were recognized as lawful structures and a post road of the United States, and the respondent pleads the terms of the acts aforesaid & the powers & faculties granted therein as conferring a right upon the respondent to build and to maintain them.

23 Wherefore the respondent prays judgment of the said petition, and that the prayer thereof be refused, and the same may be dismissed with costs; and the defendant files herewith a map of the coast as taken from the archives of the United States and as made by the officers of the coast survey, and a delineation of the track of the railroad and bridges as part of this answer.

(Signed) J. A. CAMPBELL,
Of Counsel for Company.
R. SEAL,
Att'y for the Def'ts.

Which answer is marked: Filed June 22d, 1875. Signed P. J. Murphy, clerk.

24 Afterwards, on the 24th day of June, A. D. 1875, the same being the first day of said special term, as above stated, the following petition was filed, to wit:

To the Honorable Green C. Chandler, the judge of the circuit court for the first district, sitting in the county of Hancock, in the State of Mississippi:

The respectful petition of the New Orleans, Mobile & Chattanooga Railroad Company, a company incorporated by the State of Alabama on the 24th November, 1866, and which exists in that State under

the same act of incorporation, but, by one of the amendatory acts, has been permitted to use the name of the New Orleans, Mobile & Texas R. Company, being the same corporation, and which has been recognized in the act of the Legislature of Mississippi, approved 7th February, 1867, relative to the said company, respectfully represents: That the said corporation, by the name used in the original statute and the statute of Mississippi aforesaid, has been sued
25 at a special court convened by your honor under the provisions of an act, chapter 171, approved 26 February, 1875, at the instance of the district attorney, and in the name of the State of Mississippi, by a petition for a mandamus, the object of which is to obtain an order that your petitioner should establish a draw-bridge instead of the bridge existing over the eastern branch or pass of the Pearl river, as it was built in the year- 1869 and 1870 under the provisions of the act of the Legislature of the State of Mississippi aforesaid, and which has been used and possessed by the said corporation since the construction thereof, and that the said bridge should be abated or altered to meet some undefined impression of a more suitable bridge with a draw. Your petitioner further represents that the object of the petition is of a civil nature, and that this suit is in the nature of a remedy for a civil cause, there being no presentment or indictment, and that the sum involved to your petitioner is five thousand dollars and upwards.

26. Your petitioner further says that the right to erect and to maintain the*re* present location of the bridge and the use of the same, and its maint*ai*nance for the conveyance of the cars, trains, passengers, mail, and merchandize is affirmed by the company as vesting on a contract with the State of Mississippi in the enactment aforesaid, and that the State of Mississippi has no power to repudiate that contract or to impair its obligation. That it is a vested right vesting on a contract, and supported and sustained by the Constitution of the United States, and that this cause is one arising under the Constitution of the U. S.

And your petitioner further represents that the bridge aforesaid, and its maint*ai*nances over the said river in the manner in which it exists, is authorized by the act of Congress, approved 2 March, 1868, which authorized and empowered the said company to construct, build, and maintain bridges over and across the navigable waters of the United States on the route of the said railroad
27 between Mobile and New Orleans, and that when constructed they should be recognized as lawful structures and a post road, and were declared to be such; and the Congress reserves the power to alter the same when they become an obstruction to the navigable waters.

Your petitioner says that the railroad and bridges are, and have been for three and more years, a post road over which the mails of the United States have been carried, and are now being carried, and the bridge referred to is a lawful structure under the laws of the United States.

That this suit impugns the right, privilege, and franchise granted by the act of Congress aforesaid of the 2 March, 1868.

Your petitioner offers a bond with security in the sum of one thousand dollars conditioned for entering in the circuit court of the United States, in the fifth circuit, and for the southern district of Mississippi, to be held the first Monday in November next, on the first day of the term, a copy of the record in such suit, and
28 for paying all the costs to be awarded in the said circuit court, if such court shall hold, if said court should hold that such removal of the said suit was improperly or wrongfully brought, and for filing special bail if required, and prays of this honorable court to make the order for the removal of this suit pursuant to the act of Congress of the United States, approved 3rd March, 1875, being chapter 137, to the circuit court of the United States, at the said term, there to be disposed of under the jurisdiction and order of the said court.

(Signed) JOHN A. CAMPBELL,
Agent & Attorney of said Petitioner.

Before me, L. L. Davis, clerk of the circuit court for the county of Harrison, in the State of Mississippi, personally came D. B. Robinson, general superintendent and agent of the said corporation in the petition mentioned, and on whom service was made of the
29 writ or nature in the suit, who maketh oath and saith that this petition is true in substance and in the matters of facts as stated therein.

(Signed) D. B. ROBINSON.

Sworn and subscribed before me, this 15th day of June, 1875.

(Signed) L. L. DAVIS, *Clerk.*

Which petition is marked: "Filed" June 24th, 1875. Signed T. J. Murphy, clerk.

On the same day last aforesaid defendants filed following bond' to wit:

THE STATE OF MISSISSIPPI, *Hancock County:*

Know all men by these presents, that the New Orleans, Mobile & Chattanooga Railroad Company, otherwise New Orleans, Mobile & Texas Railroad Company, a corporation of the State of Alabama, as principal, and D. B. Robinson and Stephen Callen, as sureties, are bound to the State of Mississippi in the penal sum of one thousand dollars, to be paid to the said State, and for which payment truly to made we bind ourselves, executors, administrators, and as-
30 signs by these presents. Sealed with our seals and dated this —— day of June, 1875. The condition of this obligation is such, that whereas the said railroad corporation above named has been sued at a special term of the circuit court in Hancock county, held by the judge under the act of the Legislature, chapter 171 of the Acts of 1875, approved 26 February, 1875, at the suit of the State; and whereas the said railroad corporation has applied to the judge of the court to remove the cause to the circuit court of the United States for the southern district of Mississippi, according to the con-

ditions of the act of Congress approved 3d March, 1875, chapter 137, and the order of removal has been made: Now, if the said New Orleans, Mobile & Chattanooga Railroad Company, otherwise New Orleans, Mobile & Texas R. Co., shall enter in the circuit court of the United States, to be held at Jackson, for the southern district of Mississippi, on the first Monday of November next, on the first day of the term, a copy of the record of this suit, and shall pay
31 all costs that may be awarded by the said circuit court to the said State, and all costs, if such court shall hold that the suit was wrongfully or improperly removed thereto, and shall appear and enter special bail if it were originally requisite therein, then this obligation shall be null and void, otherwise to have full force and virtue.

(Signed) NEW ORLEANS, MOBILE, CHATTANOOGA, OR TEXAS RAILROAD, [SEAL.]
By D. B. ROBINSON, *Superintendent.*
D. B. ROBINSON. [SEAL.]
STEPHEN CALLEN. [SEAL.]

THE STATE OF MISSISSIPPI, }
Harrison County, } *ss:*

Personally came and appeared before me L. L. Davis, clerk of the circuit court of said county and State, D. B. Robinson and Stephen Callen, who, being by me first duly sworn, took and subscribed the following oath: I, D. B. Robinson and Stephen Callen, do solemnly swear that I [am] worth the sum of one thousand dollars over and above all legal liabilities, and that —— have visible property to said amount, subject to levy and sale under execution, over
32 and above all property exempted by law from sale for debt.

(Signed) D. B. ROBINSON.
STEPHEN CALLEN.

Sworn to and subscribed before me, and given under my hand and seal of said court, this the 15th day of June, A. D. 1875.

[SEAL.] (Signed) L. L. DAVIS, *Clerk.*

Which bond is marked: "Filed June 24th, 1875," and signed T. J. Murphy, clerk.

And on the same day, that is to say, the 24th day of June, A. D. 1875, the same being the first day of said special term of said circuit court, the following order was made and entered upon the minutes of said court, to wit:

Mandamus.

THE STATE OF MISSISSIPPI
vs.
NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY.

Now comes the defendants, by their attorney, and moves the court that this cause be transferred, as per petition on file, to the
33 Federal circuit court in the city of Jackson in said State.

And after argument of counsel, the court being sufficiently advised in the premises,

It is, therefore, considered by the court that said motion be overruled and said transfer be refused. (Min. B'k, 3, fol. 27.)

And afterwards, to wit, on the 25th day of June, A. D. 1875, the same being the 2nd day of said special term of said circuit court, the following demurrer was filed by plaintiff to defendant's answer, to wit:

THE STATE OF MISSISSIPPI, by D. B. Seal, Dist. Att'y,
vs.
NEW ORLEANS, MOBILE & CHATTANOOGA RAILROAD COMPANY.

Now comes the said plaintiff and says that the matters and things set forth and stated in defendant's answer is not sufficient in law from precluding the plaintiff from having and maintaining their action, and demur thereto, and for special causes of demurrer say:

First. That no sufficient cause is shown why the mandamus
34 should not issue.

Second. Because no matter of fact is alleged, but only matters of law.

Third. Because of other irregularities and deficiencies in said answer, and because the same does not deny the facts as alleged.

(Signed) SEAL & CHAMPLIN,
For Demurrer.

Which demurrer is marked: Filed June 25th, 1875, and signed P. J. Murphy, clerk.

And afterwards, on the day last aforesaid, that is to say, the 25th day of June, 1875, the following order was made and entered upon the minutes of said court, to wit:

THE STATE OF MISSISSIPPI, by D. B. Seal, Dist. Attorney,
vs.
NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY. } Mandamus.

This case coming on to be heard on this day upon the plaintiff's demurrer to the defendant's answer, and after argument, and the court being now sufficiently advised in the premises, it is
35 considered that the plaintiff's demurrer be, and the same is, sustained, and that defendant's declining to answer further, it is ordered, adjudged, and decreed that a *peremptory* mandamus issued out of and under the seal of this court, directed to the said New Orleans, Mobile and Chattanooga Railroad Company, and to the president and directors thereof, directing and commanding said company to abate the nuisance and obstruction of the bridge across Pearl river on the line between the State of Louisiana and Mississippi, and to construct and maintain in the central portion of the channel of Pearl river where said railroad crosses the same a drawbridge, which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, and after the construc-

tion of the said draw-bridge, at all times provide that said draw-bridge shall be opened for the passage of any [and] all vessels seeking to pass through the same, without unnecessary delay, and
36 that plaintiff recover his costs in this case, to be taxed by the clerk of this court, and that execution issue, as required by law, and if the said railroad company shall fail to comply and obey said writ of mandamus within 90 days from date, then let a writ of attachment issue, as required by the statute against the said railroad company, its president, directors, and agents, returnable forthwith. (Min. B'k 3, fol. 28.)

"*Copy Bill of Exceptions.*"

THE STATE OF MISSISSIPPI, *Hancock County:*

Circuit court, begun and held in vacation before Green C. Chandler, judge of the circuit court for the first district of the State of Mississippi, under an act entitled "An act" to secure a more speedy trial of the writs of mandamus and prohibition in certain cases, approved February 26, 1875.

THE STATE OF MISSISSIPPI, on relative of D. B. Seal, District Attorney,

vs.

THE NEW ORLEANS, MOBILE AND TEXAS RAILROAD.

37 Be it remembered that heretofore on this day, the 24th day of June, 1875, that the defendants filed a petition and tendered a bond under an act of the Congress of the United States, entitled An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3d, 1875, which said petition and affidavit attached to the same, and the said bond are couched in these words and figures following, to wit: (See pages 23 to 31, inclusive.) The court overruled the application for removal, and decided to proceed to the trial of said case, and before the trial was had, the defendants objected and protested against the trial of said case before said judge in vacation, upon the ground that he had no jurisdiction, but should remove said case as prayed for, and waves no right. The court overruled said objection and protest, and proceed to the trial of said case, defendant prays that his objection and protest be made a part of the record in this case, which is accordingly done.

38 Witness my hand and seal on the 24th June, 1875.

(Signed) G. C. CHANDLER, *Judge.* [SEAL.]

Copy Writ of Error.

THE STATE OF MISSISSIPPI, *Hancock County:*

Special June Term, 1875.

THE STATE OF MISSISSIPPI, on relative of D. B. Seal, District Attorney,

vs.

THE NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY

The defendants beg leave to state to the judge and to the clerk of the circuit court, that there is manifest error in the proceeding and judgment had in the above cause, and now assigns the following:

First. That the petition sets out no ground or reason for the issuance of the writ of mandamus in this case.

Second. Because there is error in the judgment rendered in this case upon the demurrer filed to the answer, and the final judgement rendered upon said case, and the defendant now prays an
39 appeal from said judgment and decision of the judge trying this case in vacation to the supreme court of the State of Mississippi, where the judgment and decision can be revised and reversed, and for naught held.

(Signed) R. SEAL.

Copy of Appeal Bond (to Supreme Court).

THE STATE OF MISSISSIPPI, *Hancock County:*

Know all men by these presents, that the New Orleans, Mobile & Texas Railroad Company, and D. B. Robinson and J. V. Touline, are held and firmly bound unto the State of Mississippi in the just and full sum of five hundred dollars, for which payment, well and truly to be made, we bind ourselves, our, and each of our, heirs, executors, and administrators, and successors in office justly and firmly and severally by these presents. Signed, sealed, and delivered by us on the 25th day of June, 1875. The condition of the above obligation is such, that whereas Green C. Chandler, judge of the circuit court for the first district of the State of Mississippi, under an
40 act of the Legislature of the State of Mississippi, entitled An act to secure a more speedy trial of the writs of mandamus and prohibition in certain cases, approved February 26th, 1875, convened his court in vacation, to be held at the Bay St. Louis, in said county and State, on the 24th day [of] June, 1875, for the trial of the writ of mandamus issued in this case. The court, after hearing said cause, made the following order and decision, to wit: That the demurrer to the answer of the defendants be sustained, and that — further ordered and decreed that a peremptory mandamus issue out of and from under the seal of this court, commanding the defendants to abate the nuisance and obstruction of the bridge across Pearl river, and to construct a draw-bridge and to pay all costs.

The defendant prayed and obtained an appeal from said decision to the supreme court of the State of Mississippi.

Now, if the said defendant, the New Orleans, Mobile & Texas

Railroad Company, shall prosecute said appeal to effect, or in case of failure for the payment or performance of the judgment,
41 decree, or sentence of the supreme court of the State of Mississippi, then this obligation to be void, else to remain in full force and effect.

(Signed) NEW ORLEANS, MOBILE & CHATTANOOGA, OR TEXAS RAILROAD, [SEAL.]
By D. B. ROBINSON, *Sup't.* [SEAL.]
D. B. ROBINSON. [SEAL.]
JOHN V. TOULINE. [SEAL.]

THE STATE OF MISSISSIPPI, *Hancock County:*

Personally came and appeared before me, I. J. Murphy, clerk of the circuit court of said county and State, D. B. Robinson and John V. Touline, who, being by me first duly sworn, took and subscribed the following oath: I, D. B. Robinson and John V. Touline, do solemnly swear that I am worth the sum of five hundred dollars over and above all legal liabilities, and that we have visible property to said amount, subject to levy and sale under execution, over and above all property exempted by law from sale for debt.

(Signed) D. B. ROBINSON.
JOHN V. TOULINE.

Sworn to and subscribed before me, this 25th day of June, A. D. 1875.

(Signed) T. J. MURPHY, *Clerk.*

42 The foregoing bond and security approved by me, this the 25th day of June, A. D. 1875.

(Signed) T. J. MURPHY, "*Clerk.*"

"Which bond is marked:" Filed June 25th, 1875, and signed T. J. Murphy, clerk.

And on the same day, that is to say, the 25th day of June, 1875, and the 2nd day of said special term of said circuit court, the following order was made and entered upon the minutes of said court, to wit:

THE STATE OF MISSISSIPPI on relation of D. B. Seal, District Attorney,
vs.
THE NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY. } Mandamus.

The defendants prayed and obtained an appeal from the decision of the said judge trying the writ of mandamus in the above case to the supreme court of the State of Mississippi, on giving bond in the sum of five hundred dollars, conditioned as required by law,
43 with D. B. Robinson and John V. Touline security, which bond and security was given in open court and approved, and to operate as a supersedeas to the judgment in this case.

Min. Book No. 3, fol. 28.

And afterwards, to wit, on the 26th day of July, 1876, the following mandate was rec'd and filed as follows, to wit:

The State of Mississippi to the honorable the circuit court of Hancock county, Greeting:

Whereas, on the 17th day of July, 1876, the same being a day of the regular term of our supreme court, begun and held in the court-room, in the capitol, in the city of Jackson, in said State, on the third Monday of April, in the year of our Lord 1876, the following final judgment was rendered by our supreme court, to wit:

NEW ORLEANS, MOBILE AND CHATTANOOGA, OR TEXAS R. R. CO. *vs.* THE STATE OF MISS.	No. 1756.

44 This cause having been submitted at a former term upon the record herein from the circuit court of Hancock county, and this court having sufficiently examined and considered the same, and being of opinion that there is no error therein, doth order and adjudge that the judgment of said court rendered in this cause on the 25th day of June, 1875, be, and the same is hereby, affirmed.

And it is further considered, and so ordered and adjudged by this court, that the defendant in error do have and recover of the plaintiff in error and D. B. Robinson and J. V. Touline, sureties on the writ of error bond, the cost of this cause in this court and in the court below expended, or to be taxed, &c.

You are, therefore, hereby commanded that such execution and further proceedings be had in said cause as, according to right and justice, the judgment of our supreme court and the law of the land ought to be had.

Witness the Hon. H. F. Simrall, chief justice of our supreme
45 court, also the signature of the clerk, and the seal of said court, at the office at Jackson, this the 20th day of July, 1876.

(Signed) A. W. LITTLE, *Clerk*.
By W. E. CAGE, *D. C.*

And marked: Filed July 26th, 1876, and signed T. J. Murphy, clerk.

And afterwards, to wit, the 19th day of March, 1881, the following mandate was filed, to wit:

The State of Mississippi to the honorable the circuit court of Hancock county, Greeting:

Whereas, on the 14th day of March, 1881, the same being a day of the regular term of our supreme court, begun and held in the court-room in the capitol, in the city of Jackson, in said State, on the 3d Monday of October, in the year of our Lord 1880, the following final judgment was rendered by our said supreme court, to wit:

NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY
vs.
STATE OF MISSISSIPPI. } No. 1756.

46

The mandate of the Supreme Court of the United States, wherein this cause has lately been pending on writ of error to this court, having been received and filed by the clerk, and this court proceeding now in accordance with the direction contained in said mandate to render the proper judgment in this cause, doth order and adjudge that the judgment of the circuit court of Hancock county rendered in this cause on the 25th day of June, 1875, be, and the same is hereby, reversed, and this cause remanded with directions to said circuit court to set aside all judgments and orders made in this cause, after the presentation of the petition and bond for its removal into the circuit court of the United States, and to proceed no further in said cause. And it is further considered, and so ordered and adjudged by this court, that the plaintiff in error do have and
47 recover of the defendants in error the costs of this cause in this court expended, or to be taxed, &c.

You are, therefore, hereby com-anded that such execution and further proceedings be had in said cause, as according to right and justice, the judgment of our said supreme court *court* and the law of the land ought to be had.

Witness the Hon. H. H. Chalmers, chief justice of our supreme court, also the signature of the clerk, and seal of said court hereunto affixed, at office at Jackson, this the 16th day of March, 1881.

[SEAL.] (Signed) OLIVER CLEFTON, *Clerk.*
By C. C. CAMPBELL, *D. C.*

Which mandate is marked: Filed March 19th, 1881, and signed E. H. Hoffman, clerk.

48 THE STATE OF MISSISSIPPI, *Hancock County:*

I, Emile H. Hoffman, clerk of the circuit court in and for said county and State, do hereby certify that the foregoing 46 pages contain a true and complete transcript of all the proceedings, &c., in said cause as the same appears on file and of record in our said court.

Witness my hand and the seal of said circuit court, at office, in the town of Bay St. Louis, this the 5th day of April, A. D. 1881.

[SEAL.] E. H. HOFFMAN,
Circuit Clerk.

Said transcript from said State circuit court of Hancock county was filed in this court, and has endorsed thereon the following:

"Filed April 9th, 1881. J. M. McKee, clerk."

And on the 2nd day of May, 1881, the following direction to continue said cause was filed in the office of the clerk of said
49 court, and is in the words and figures following, to wit:

THE STATE OF MISSISSIPPI *v.* THE N. O., M. & T. R. R. Co.

This cause is continued, and no action will be taken on it at this term of the court.

THOS. L. BAYNE,
Att'y for Def't.

And is endorsed: "Filed May 2, 1881. J. M. McKee, cl'k."

And on the 2nd day of May, A. D. 1881, the following proceedings were had and entered of record upon the minutes of said court, in the words and figures following, to wit:

"Pleas and proceedings had and done at a regular term of the circuit court of the United States for the southern district of Mississippi and fifth judicial district, begun and held pursuant to law in the court-room of said court, in the city of Jackson, in said
50 district, on the first Monday, being the second day of May, A. D. 1881.

Present and presiding the Honorable R. A. Hill, U. S. district judge for Mississippi.

STATE OF MISSISSIPPI
vs.
NEW ORLEANS, MOBILE & CHATTANOOGA RAILROAD Co. } Continued."

And afterwards, to wit, on the 7th day of November, A. D. 1881, the following proceedings were had and entered of record on the minutes of said court, in the words and figures following, to wit:

"Pleas and proceedings had and done at a regular term of the circuit court of the United States for the southern district of Mississippi, begun and held pursuant to law in the court-room of said court, in the city of Jackson, in said district, on the first
51 Monday, being the 7th day of November, A. D. 1881.

Present and presiding the Honorable R. A. Hill, United States district judge for Mississippi."

And afterwards, to wit, on the 14th day of November, A. D. 1881, the same being a day of the regular November term, 1881, the following proceedings were had and entered of record upon the minutes of said court in the words and figures following, to wit:

"MONDAY, *November* 14, 1881.

Court met pursuant to adjournment. Present, the Honorable R. A. Hill, U. S. district judge for Mississippi.

52 THE STATE OF MISSISSIPPI
vs.
THE NEW ORLEANS, MOBILE & TEXAS RAILROAD Co.

On motion of the defendant in the above-entitled cause the defendant railroad company is allowed to withdraw its answer, and is allowed sixty days in which to plead, answer, or demur to the peti-

tion filed by the State of Mississippi, and the said cause stands continued until the next term of this court.

And on the 1st day of May, A. D. 1882, the defendants filed their demurrer to the petition of plaintiffs, in the words and figures following, to wit:

53 Circuit Court of the United States, Southern District of Mississippi.

THE STATE OF MISSISSIPPI *ex rel.* District Attorney, &c.,
vs.
THE NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY.

Demurrers to Petition.

By due leave of the court under the order for repleader heretofore granted, now comes the defendant by its attorney and demurs to the said petition for mandamus. And for causes of demurrer assigns the following:

1. That it appears from said petition that said company was duly empowered and authorized to construct its said railroad and bridge across the said Pearl river at the point where the said bridge is now and was at the time of the filing of the said petition constructed and maintained; and that said defendant was not by law required, but was and is expressly exempted from the construction of the drawbridge as prayed in the said petition, and from any and all duty to maintain the same, if the said company should locate the line of their road across the channel of the Rigolet at a point south of or below the principal entrance of Pearl river into the Rigolet; and the said petition fails to show that the said railroad company did not locate their said line of road across the channel of the Rigolet at a point south of or below the principal entrance of said Pearl river into the Rigolet; and the said petition fails to show that the State of Louisiana has not consented to or authorized the said location and construction of said road and bridge across said Pearl river at the place and in manner as the same is now constructed and maintained across said Pearl river.

2. That said petition shows that the said railroad is a public highway, and the said road and the bridge which is alleged to be a nuisance and a purpresture is a public improvement, duly authorized by law to be constructed and maintained across the said Pearl river at the point and in the manner that the same is shown to be constructed and maintained.

3. That said petition showing that said bridge across Pearl river is a part of a great highway running into and through three States and constructed and authorized by law for the public weal, fails to show that the said bridge has interfered or will so seriously interfere with the commerce of said Gulf of Mexico, or of said river, or of the said State of Mississippi, or of the United States, as to make the erection or maintenance thereof a nuisance or purpresture, or to require the removal thereof or the placing of a draw therein as prayed.

4. That said petition seeking to compel the said defendant to re-

move its present bridge, and to place and maintain a draw-bridge in said Pearl river which shall give a clear space for the passage of vessels of not less than sixty feet in width, fails to show that such a draw, and of the dimension stated, is necessary for the public commerce or traffic or for the convenient or safe navigation of the said river.

5. That the facts in said petition alleged do not warrant or justify the issuance of the writ of mandamus as prayed therein.

6. That the petition requires the erection and maintenance of a draw-bridge partly within the territory of Louisiana, in or over which the State of Mississippi can exercise or enforce no jurisdiction or power.

GAYLORD B. CLARK,
Attorney for Defendant.

54 Which said demurrer is endorsed as follows, to wit: "Filed May 1st, 1882. J. M. McKee, clerk."

And on said 1st day of May, A. D. 1882, the defendants filed their answer to the petition of the plaintiff in said cause, in the words and figures following, to wit:

55 Circuit Court of the United States, Southern District of Mississippi.

THE STATE OF MISSISSIPPI *ex rel.* District Attorney, &c.,
vs.
THE NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY.

Answer.

The New Orleans, Mobile and Chattanooga Railroad Company, whose name was by law changed to the New Orleans, Mobile and Texas Railroad Company, a corporation of the State of Alabama, without waiving its demurrers to the petition, heretofore duly filed, but insisting on the same, by its attorney now comes and by leave of court repleads, and for answer and plea to the petition of said plaintiff, says:

1. That defendant was duly incorporated by an act of the General Assembly of the State of Alabama, approved November 24th, 1866, entitled "An act to incorporate the New Orleans, Mobile and Chattanooga Railroad Company." That by its said charter defendant was authorized to construct and own, maintain, manage, and use a railroad from the city of Mobile, in the State of Alabama, across the States of Alabama and Mississippi to the city of New Orleans, in the State of Louisiana, with such rights, privileges, and franchises as should thereafter be granted to defendant by the States of Mississippi and Louisiana, and it was made its duty as a public carrier to take, transport, carry, and convey persons and property over said railroad by steam or other power. That said corporation, by its charter, was also empowered to take and receive any rights, grants, franchises, or privileges from the United States.

2. And defendant avers that the Legislature of the State of Missis-

sippi did enact a statute, entitled "An act in relation to the New Orleans, Mobile and Chattanooga Railroad Company, a corporatton of the State of Alabama, and authorizing and empowering said company to exercise and enjoy its corporate powers and franchises in the State of Mississippi," approved February 7, 1867, by which, among other things, defendant was authorized and empowered to exercise in the State of Mississippi the corporate powers, rights, and privileges conferred on said corporation by its said Alabama charter, save as specially reserved in said act of February 7th, 1867. And for the purposes of said railroad the defendant was authorized to take by purchase, and when necessary, by proceedings *in invitum*, land and property for the construction of said railroad, and it was in said act declared that the property so acquired should be deemed to be acquired for public use.

3. For further answer to said petition, defendant avers and shows that in the sixth subdivision of said statute of Mississippi the location of the said railroad in the State of Mississippi, and the designation of the various navigable waters and the places thereon, and modes of making the bridges thereover respectively, are declared, and it is provided that defendant "is authorized and empowered to construct and maintain its said railroad over and across any of the waters of this State on the line of the same by bridges: *Provided, however*, That in the central portion of the channel of the Pearl river, of the Bay of St. Louis, of the Bay of Biloxi, and of the East Pascagoula river, and in each of them, said company shall construct and maintain a draw-bridge, which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, and said company, after the construction of the said draw-bridges, shall at all times thereafter provide that said draw-bridges shall be open for the passage of any and all vessels seeking to pass through the same without unnecessary delay."

4. The defendant avers that as to all of the streams mentioned in the foregoing clause of the said enactment there has been exact performance by the company, except in reference to the central
56 portion of the channel of Pearl river. And defendant avers that the said statute further enacts, by way of proviso and limitation to the foregoing requirement as to draw-bridges, "that in case the company shall locate the line of their road *across the channel of the Rigolet at a point south of or below the principal entrance of Pearl river into the Rigolet, then the said company shall not be required to construct a draw-bridge across any bayou leading into Pearl river, across any small pass or mouth of said river.*"

5. It is also in said act provided, that such part of said section six as relates to Pearl river, if the line of the road should be located across the said river at a point where it constitutes the boundary line between the States of Mississippi and Louisiana, should not take effect until the State of Louisiana had consented to and authorixed the same, or until said company had built such a bridge across said Pearl river, for its said railroad, as should be in accordance with said section, and also with any authority or power granted to said company by the said State of Louisiana in the premises; and

such draw-bridge might be built in the centre of the channel of said Pearl river, or within that portion of the same within the territory of the State of Louisiana, or of the State of Mississippi, as most convenient for the public use.

6. Defendant further avers and shows that by an act duly passed by the Legislature of the State of Louisiana in relation to the New Orleans, Mobile and Chattanooga Railroad Company, the [defendant,] and authorizing and empowering the defendant to exercise and enjoy corporate powers and franchises in the State of Louisiana, approved August 19th, 1868, it was provided that said company might construct a bridge across Pearl river, and "that in case the company shall locate their road across the Great Rigolets at a point south or below the principal entrance of Pearl river into the Great Rigolets, then the company shall only be required to construct one draw-bridge, which shall be in the channel of the Great Rigolets as hereinafter named," &c.

7. And defendant further avers and shows that at the time of the passage of the said Mississippi act, and now, from any point on the Rigolets south of or below the principal entrance of Pearl river into the Rigolets, to the Mississippi line, there is no navigable opening, pass, or mouth of said river, which is or could be crossed by the said railroad and bridge excepting the mouth of said river which is known and designated as East Pearl river.

8. And defendant avers that the said company did locate the line of their road across the channel of the Rigolets at a point south of and below the principal entrance of Pearl river into the Rigolets, and did construct and have ever since maintained the bridge across the Rigolets with the draw as prescribed in said act, and said company did make a bridge across said East Pearl river without any draw, and according to the directions of, and in pursuance to the powers granted said company in, said act.

9. And defendant further avers that prior to the passage of the said act of Mississippi, the commerce and traffic of said Pearl river had been always theretofore and then was being done almost wholly with the city of New Orleans, and with places upon the Lake Pontchartrain; and the same was done through the principal entrance of Pearl river into the Rigolets, and thence through the Rigolets and said lake or through other passes than the mouth of East Pearl river. That the commerce from points on Pearl river with points on Lake Borgne could be better done by the said route into the Rigolets, and thence into Lake Borgne, than by the mouth of said river called East Pearl river, the distance being much shorter by the Rigolets, and the water by that route being of sufficient depth to satisfy all the wants of the commerce of said river, and that the traffic, if any, through said mouth of East Pearl river was inconsiderable in value and amount.

10. And defendant further avers and shows that the commerce of said Pearl river as it had theretofore been, and was at the time of the passage of said statute of Mississippi granting said authority, has not been in any way seriously interfered with, hindered, or obstructed. That had the said railroad and bridge been located across

the channel of the Rigolets at a point north of or above the
57 principal entrance of the Pearl river into the Rigolets, the commerce of said Pearl river would have been greatly obstructed, if not destroyed, unless a draw-bridge or draw-bridges had been placed in the said Pearl river as well as in the said Rigolets.

11. Defendant, further answering, avers that the surveys of the said railroad were made and the work done in the years 1868 and 1869, conformably to the power and authority of the States of Alabama, Mississippi, and Louisiana, and from the year last aforesaid the said railroad has been and is a great public highway through these States and connecting them with other portions of the United States. And that the Congress of the United States, in view of the magnitude of the work and the cost of its construction, and to expedite it, by an act entitled "An act to establish and declare the railroad and bridges of the New Orleans, Mobile and Chattanooga Railroad Company as hereafter constructed a post road and for other purposes," approved March the 2nd, 1868, authorized and empowered the said corporation to construct, build, and maintain bridges over and across the navigable waters of the United States on the route of said railroad between New Orleans and Mobile for the use of the said company, and the passage of its engines, cars, train of cars, passengers, mails, and merchandise; and that the railroad and its bridges, when complete and in use, were to be held and declared lawful structures and a post road. By said act of Congress draw-bridges were required on the Pascagoula river, the Bay of Biloxi, and the Bay of St. Louis, and the Great Rigolet, but none was required on Pearl river; and defendant avers that the said structures and the bridge across said Rigolets were completed and in use during and after, to wit, the year 1869.

12. Further answering, defendant avers and shows that there is now in the said bridge across East Pearl river a draw which is adequate for all of the wants of navigation and the commerce of said river, past, present, and prospective, which *bridge* was voluntarily placed therein by the owners of said railroad since the construction of said bridge, the said draw having a clear space or passage of, to wit, thirty-four to thirty-six feet, which is of a width sufficient to accommodate and pass vessels navigating said East Pearl river; that the depth of water in said draw is sufficient to float and pass vessels which can cross the bar at the mouth of and enter said East Pearl river from Lake Borgne.

13. And defendant avers that the said bridge, as originally constructed and as now maintained, was made under the power and authority granted by the United States and the States of Louisiana, Mississippi, and Alabama. That said bridge was constructed at great cost, amounting to the sum of twenty thousand dollars and upwards. That the erection of a draw as sought to be compelled by the said petition would necessitate the destruction in large part of its present structure, and the erection and maintenance at a very great cost and expense of another bridge without any public or commercial necessity therefor, and so long as the present structure is authorized as aforesaid it is not competent for the courts to interfere

with the maintenance of nor abate said bridge as illegal or a nuisance; and defendant here pleads the said acts of the States of Alabama, Mississippi, and Louisiana, and of the Congress of the United States, and the power and authority therein granted, as granting to and confirming in defendant a right to build and maintain the said bridge as now constructed and maintained across the said East Pearl river.

Defendant files herewith as a part of this answer a copy of a map of the coast, as taken from the archives of the United States and as made by the officers of the coast survey, on which said map is delineated the track and bridges of defendant as the same are located in reference to said coast and to said Pearl river and the Rigolets.

Wherefore defendant prays judgment of the said petition, and that the prayer thereof be refused, and that the same may be dismissed.

GAYLORD B. CLARK,
Attorney for Defendant.

58 And with said answer the defendant filed the following exhibit (map):

(Here follows map, marked page 59.)

60 Which said answer and exhibit are endorsed as follows, to wit: "Filed May 1st, 1882. J. M. McKee, cl'k."

And on said 1st day of May, 1882, the plaintiff filed its demurrer to the answer of defendant, in the words and figures following, to wit:

Circuit Court U. S., So. Dist of Miss.

THE STATE OF MISSISSIPPI
vs.
THE N. O., M. & CHATTANOOGA R. R. Co.

Plaintiff comes and demurs to the answer herein filed by defendant, and says that the matters and things set out and contained are wholly insufficient in law, and therefore constitute no valid defense.

61 Wherefore plaintiff prays judgment, &c.

T. C. CATCHINGS, *Att'y Gen'l.*

And afterwards, to wit, on the sixth day of November, A. D. 1882, the following proceedings were had and entered of record on the minutes of said court, in the words and figures following, to wit:

"UNITED STATES OF AMERICA,
Southern District of Mississippi:

Pleas and proceedings had and done at a regular term of the circuit court of the United States for the southern district of Mississippi, begun and held pursuant to law in the court-room of said court, in the city of Jackson, in said district, on the first Monday, being the sixth day of November, A. D. 1882.

Present and presiding, the Honorable R. A. Hill, U. S. district judge for Mississippi."

62 And afterwards, to wit, on the 2nd day of December, A. D. 1882, the same being a day of the regular November term, A. D. 1882, the following proceedings were had and entered of record upon the minutes of said court, to wit:

"November Term, 1882.

SATURDAY, *December* 2, 1882.

Court met pursuant to adjournment.

Present, the Honorable R. A. Hill, United States district judge for Mississippi.

63 THE STATE OF MISSISSIPPI
vs.
THE NEW ORLEANS, MOBILE & CHATTANOOGA R. R. Co. } No. 2747.

This case having been submitted to the court upon the demurrer herin filed by the defendant, The New Orleans, Mobile & Texas R. R. Company, a corporation of the State of Alabama, incorporated under the name of the New Orleans, Mobile & Chattanooga R. R. Company, whose name has since been changed to the New Orleans, Mobile & Texas R. R. Company, to the petition herein filed of the State of Mississippi, and the court being fully advised therein, it is ordered that the same be overruled; and the case at the same time having been further submitted upon the demurrer herein submitted of the State of Mississippi to the answer herein filed of the New Orleans, Mobile & Texas R. R. Company, and the court being fully advised therein, it is ordered that the same be*ing* sustained;
64 and the defendant declining to answer further, it is ordered and adjudged that a peremptory writ of mandamus issue directed to the New Orleans, Mobile & Texas R. R. Company and the president and directors thereof, directing and commanding the said company to at once remove the bridge which they have heretofore erected across Pearl river, and in lieu thereof to construct and maintain in the central portion of the channel of said Pearl river, where its said railroad crosses the same, a draw-bridge, which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, and thereafter to provide that said draw-bridge shall be opened for the passage of any and all vessels seeking to pass through the same without unnecessary delay, provided, however, that said draw-bridge may be built either in the center of the channel of said Pearl river, or in that portion of the
65 same within the territory of the State of Louisiana, or of this State, as may be most convenient for public use; it is further considered by the court that the defendant do pay the costs of this suit, to be taxed, and that execution issue therefor; it is further ordered that the defendant may have a writ of error to have this judgment reviewed by the Supreme Court of the United States, to operate as a supersedeas upon the execution of a bond, to be con-

ditioned and approved according to law, in the penalty of three thousand dollars.

Ordered and adjudged, this 2nd day of Dec., 1882.

R. A. HILL, *Judge*.

And on the 27th day of December, A. D. 1882, a writ of error bond was filed in said cause, in the words and figures following, to wit:

66 Know all men by these presents, that we, W. H. Pratt and A. C. Danner, are held and firmly bound unto the State of Mississippi in the full and just sum of three thousand dollars, to be paid to the said State of Mississippi, her certain attorney or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 23d day of December, anno Domini eighteen hundred and eighty-two.

Whereas lately, at a term of the circuit court for the southern district of Mississippi, in a suit depending in said court between the said State of Mississippi and the New Orleans, Mobile and Texas Railroad Company, a judgment was rendered against the said New Orleans, Mobile and Texas Railroad Company, and the said
67 New Orleans, Mobile and Texas Railroad Company having obtained a writ of error, and having filed a copy thereof in the clerk's office of the said court, to reverse the said judgment in the aforesaid suit, and a citation directed to the said State of Mississippi, citing and authorizing her to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next:

Now, the condition of the above obligation is such, that if the said New Orleans, Mobile and Texas Railroad Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

W. H. PRATT, *Ex.* [SEAL.]
A. C. DANNER. [SEAL.]

Sealed and delivered in the presence of—
GAYLORD B. CLARK.

Bond approved.

DON A. PARDEE,
Circuit Judge.

68 Which said writ of error bond is endorsed as follows, to wit: "Filed Dec. 27th, 1882. J. M. McKee, cl'k."

I, James M. McKee, clerk of the circuit court of the United States for the southern district of Mississippi, do hereby certify that the foregoing sixty-seven pages contains a true, full, and perfect transcript of the record of the cause in said court, wherein the State of Mississippi on the relation of the District Attorney is plaintiff, and the New Orleans, Mobile and Texas Railroad Company is defendant, (being the same cause mentioned in the writ of error, the original

of which, with the citation, is herewith transmitted,) as fully and completely as the same now remains of record in my office.

Given under my hand and the seal of said court, this 5th day of June, A. D. 1883.

[SEAL.] JAS. M. McKEE, *Clerk.*

69 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judge of the circuit court of the United States for the southern district of Mississippi, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you, between The State of Mississippi on the relation of the District Attorney, &c., and the New Orleans, Mobile and Texas railroad Company, a manifest error hath happened, to the great damage of the said New Orleans, Mobile and Texas Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given, that then, under your seal, distinctly and
70 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 22nd day of December, A. D. 1882.

[SEAL.] JAS. M. McKEE,
Clerk of the Circuit Court of the United States,
Southern District of Mississippi.

[Endorsed:] No. 2747. U. S. circuit co., so. dist. of Miss. The State of Mississippi *ex rel.* Dist. Att'y *vs.* The New Orleans, Mobile & Texas Railroad Co. Writ of error.

71 The United States of America to the State of Mississippi, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the southern district of Mississippi, wherein the New Orleans, Mobile and Texas Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why a judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

DON A. PARDEE, *Judge.*

Witness the Honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of December, in the year of our Lord one thousand eight hundred and eighty-two.

72 On this fifth day of Jan'y, in the year of our Lord one thousand eight hundred and eighty-three, personally appeared Wm. C. Raum, U. S. marshal south. dist. of Miss., before me, the subscriber, a commissioner of the U. S. cir. court for said southern dist. of Mississippi, and makes oath that he delivered a true copy of the within citation to Thos. C. Catchings, att'y gen'l of State of Mississippi, on this day, at Vicksb'g, Miss.

W. C. RAUM, *U. S. Marshal.*

Sworn to and subscribed, the 5th Jan'y, A. D. 1883.

[SEAL.] LAZ. LINDSEY,

U. S. Com. Southern Dist. of Miss.—Vicksb'g, Miss.

[Endorsed:] No. 2747. State of Miss. *vs.* Mobile & Texas R. R. Citation. Service on, 2.00; mileage to V'b'g, 45 miles, @ .06, 2.70; affidavit, .25; E. & R. & copy, 1.00; 85395. Rec'd and filed Jan'y 6, 1883. J. M McKee, cl'k.

Endorsed on cover: S. Mississippi C. C. U. S. No. 599. The New Orleans, Mobile and Texas Railroad Company, plaintiff in error, *vs.* The State of Mississippi *ex rel.* the District Attorney. Filed 25th September, 1883.

112-12

Supreme Court of the United States.

October Term 1883.

THE NEW ORLEANS, MOBILE & TEXAS R. R. Co.
vs.
THE STATE OF MISSISSIPPI *ex rel.* THE DISTRICT ATTORNEY. } No. 982.

MOTION TO ADVANCE.

This is a proceeding by the State of Mississippi to compel the railroad company to construct a draw-bridge over Pearl river, where their road crosses it, in lieu of the closed bridge now used by the company.

The suit was commenced in 1875 in a State court. Certain proceedings were had for a removal of the cause to the United States Circuit Court of the southern district of Mississippi. In said proceedings for a removal the cause came to this court, and a removal was ordered.

Thereafter the proceedings were continued in the said United States Circuit Court to a final decree, rendered in December, 1882.

The decree was in favor of the State, and ordered the obstruction to navigation on Pearl river, occasioned by the railroad bridge, to be removed, and a draw-bridge to be erected.

From this the railroad company sued out a writ of error.

We petition now that the cause be advanced for argument.

The court will judicially know that Pearl river is a navigable stream, and that it lies in part wholly in the State of Mississippi, and as to the remaining part it is the boundary line of said State.

The obstruction has been judicially ascertained; there is no question about that. The claim of the railroad company is that such obstruction was authorized by the laws of Mississippi chartering said railroad, passed in 1866.

Pearl river is largely used in navigation, and the obstruction at the bridge causes a transhipment of goods there at a considerable cost.

It is respectfully submitted that the case ought to be advanced, both on the ground that the State is a party and that the speedy determination of the question at issue in it is of great public importance.

J. Z. GEORGE,
Of Counsel for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 909.

THE NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSISSIPPI, EX REL. THE DISTRICT ATTORNEY, DEFENDANT.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

BRIEF OF

THOMAS L. BAYNE
AND
GAYLORD B. CLARK,
For Plaintiffs in Error.

Supreme Court of the United States,

OCTOBER TERM, 1884.

No. 599.

THE NEW ORLEANS, MOBILE AND TEXAS RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

THE STATE OF MISSISSIPPI, EX REL: THE DISTRICT ATTORNEY, DEFENDANT,

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In Error to the Circuit Court of the United States for the Southern District of Mississippi.

STATEMENT OF THE CASE.

The New Orleans, Mobile and Chattanooga Railroad Company, the Plaintiff in Error, was duly incorporated by the Legislature of Alabama, November the 24th, 1866.

By its charter the said Railroad Company was authorized to construct and operate a railroad from Mobile, in the State of Alabama, across the States of Alabama, Mississippi and Louisiana; with such other rights, privileges and franchises as should thereafter be granted to it by the States of Mississippi and Louisiana. The said Corporation was also empowered by its charter to take and receive any rights, grants, franchises or privileges from the United States.

The Legislature of the State of Mississippi on February 7th, 1867, passed an act in relation to the said Railroad Company; wherein, it was recognized as a corporation of the State of Alabama, and was authorized and empowered to exercise and enjoy its corporate powers and franchises in the State of Mississippi,

subject only to the conditions, provisions and restrictions of the said enabling act and the general laws of the State of Mississippi.

On the 19th of August, 1868, the Legislature of the State of Louisiana also passed an act in relation to the said Railroad Company, recognizing its corporate existence and authorizing and empowering said Company to enjoy and exercise its corporate powers and franchises in the State of Louisiana, subject only to the conditions, provisions and restrictions of the said last named enabling act.

Subsequently by an act of the Legislature of Alabama the name of the said Railroad Company was changed to that of the "New Orleans, Mobile and Texas Railroad Company."

By Section 2 of the Mississippi charter of the said Railroad Company, it was provided:

"That to enable said Company to accomplish the purposes and objects of its incorporation, the furtherance and pursuit of which in this State is granted, the said Company is empowered and authorized: First, To construct and maintain, and thereafter to own, maintain, manage and use a railroad, with such tracks and suitable turnouts, and upon such a course or route as may be deemed by a majority of the Directors of said Company most proper, expedient or necessary, and best adapted for the public accommodation, from any point on the line between this State and the State of Louisiana, and thence towards and to any point on the line between this State and the State of Alabama, crossing and passing through this State between said points, with the power and authority to extend the said Railroad as contemplated in the said act of incorporation, from the western boundary of this State towards and to New Orleans, in the State of Louisiana, and from the eastern boundary of this State, towards and to the City of Mobile, in the State of Alabama, and thence to other places, as provided in said act of incorporation. * * * * Fifth, To lay out its said Railroad, and to construct the same, not exceeding two hundred feet in width, upon any lands of this State, and to take, hold, and use for the purposes of necessary depots, stations, cuttings, turnouts, and for obtaining stone, gravel, earth and timber, for the construction of its said Railroad, any lands of this State lying along or upon or adjacent to the route or course of said Railroad that may be necessary for the construction, maintenance and security of such Railroad. * * * * Sixth, To construct and maintain its said Railroad, or any part of the same, and to have the right of way therefor, across or along or upon any waters, water course, river, bay, inlet, street, highway, turnpike or canal within this State, which the course of said Railroad may intersect, touch or cross; *Provided*, The said Company shall preserve any water course, street, highway, turnpike, or canal, which its said Railroad may so pass upon, along, intersect, touch or cross, so as not to impair its usefulness to the public, unnecessarily, or if temporarily impaired in and during the construction of said Railroad, the said Company shall restore the same to its former state, or to such a state that its usefulness and convenience to the public shall not be unnecessarily or materially impaired or injured; and it is also provided that said Company is authorized and empowered to construct and maintain its said Railroad over and across any of the waters of this State on the line of the

same, by bridges; *Provided, however*, That in the central portion of the channel of the Pearl river, of the Bay of St. Louis, of the Bay at Biloxi, and of the East Pascagoula river, and in each of them, said Company shall construct and maintain a draw-bridge, which, when open, shall give a clear space for the passage of vessels, of not less than sixty feet in width, and said Company, after the construction of the said draw-bridges, shall, at all times thereafter, provide that said draw-bridges shall be opened for the passage of any and all vessels seeking to pass through the same without unnecessary delay; *Provided, however, That in case the Company shall locate the line of their road across the channel of the Rigolet, at a point south of or below the principal entrance of Pearl river into the Rigolet, then the said Company shall not be required to construct a draw-bridge across any bayou leading into Pearl river, or across any small pass or mouth of said river.* It is also provided that such part of this section as relates to Pearl river, if the line of the road shall be located across the said river at a point where it constitutes the boundary line between the State of Mississippi and the State of Louisiana, shall not take effect until the State of Louisiana has consented to, and authorized the same, or said Company has built such a bridge across said Pearl river, for its said Railroad, as shall be in accordance with this section, and also with any authority or power granted to said Company by the said State of Louisiana in the premises, and such draw-bridge may be built in the centre of the channel of said Pearl river, or in that portion of the same within the territory of the State of Louisiana or of this State, as most convenient for public use."—Laws of Miss., 1867, p. 332, (335, 336).

By subdivision eight of Section 2 of its said Louisiana charter the said Company was authorized:

"To construct and maintain its said Railroad or any part of the same, and to have the right of way therefor across or along, or upon any waters, water course, river, lake, bay, inlet, street, highway, turnpike, or canal within the State of Louisiana, which the course of said Railroad may intersect, touch, or cross, provided the said Company shall preserve any water course, street, highway, turnpike, or canal which its said Railroad may so pass upon, along intersect, touch, or cross, so as not to impair its usefulness to the public unnecessarily; or if temporarily impaired in and during the construction of said Railroad, the said Company shall restore the same to its former state, or to such a state that its usefulness and convenience to the public shall not be unnecessarily impaired, or materially impaired or injured; and it is also provided that said Company is authorized and empowered to construct and maintain its said Railroad over and across the waters of the State of Louisiana, known as the Pass Chef Menteur, Little Rigolet, Great Rigolet, or that part of Lake Pontchartrain east of the west line of Point aux Herbs, and the West Pearl river, and other streams and bayous between Lake Pontchartrain, and Pearl river, and Pearl river by bridges; *Provided, however*, That in the channel of that part of Lake Pontchartrain hereinbefore named, there shall be constructed and maintained by said Company a draw-bridge, which, when open, shall give a clear space for the passage of vessels of not less than one hundred feet in width; and in the channel of the Pearl river the said Company shall construct and maintain a drawbridge, which, when open, shall give clear space for the passage of vessels of not less than sixty feet in width, *except in case the Company shall locate their road across the Great Rigolet at a point south of (or below) the principal entrance of Pearl river into the Great Rigolet, when the Company shall only be required to construct one draw-bridge, which shall be in the channel of the Great Rigolet, as hereinbefore named;* and said Company, after the construction of the said

draw-bridges or draw-bridge, shall at all times thereafter provide that said draw-bridges or draw-bridge shall be opened for the passage of any and all vessels seeking to pass through the same, without unnecessary delay."—Acts of Louisiana, 1868, No. 28.

The said Railroad was located across the State of Mississippi in 1868, and was constructed in the years 1868 and 1869, and was finished and commenced operations in 1870.

On the second of March, 1868 Congress passed an act, entitled "An Act to establish and declare the Railroad bridges on the New Orleans, Mobile and Chattanooga Railroad Company, as hereafter constructed a postroad, and for other purposes."

By the said act of Congress the said Railroad Company were expressly:

"Authorized and empowered to construct, build and maintain bridges over and across the navigable waters of the United States on the route of said Railroad between New Orleans and Mobile for the use of said Company, the passage of its trains of cars, passengers, and mail and merchandise thereon."

And said Railroad Company, and *its bridges aforesaid,* when constructed, completed and in use in accordance with said act and the laws of the several States through whose territory the same were located, were declared to be a lawful structure and a postroad. It was provided, however, in said act:

"That the said Company, in the construction of its bridges over and across the waters known as the Pascagoula river, the Bay of Biloxi, the Bay of St. Louis and the Great Rigolet, shall construct and maintain drawbridges in the channels thereof, which, when open, would give a clear space for the passage of vessels of not less than eighty feet in the passage of the East Pascagoula river and the Bay of Biloxi and of the Bay of St. Louis, and of not less than one hundred feet in the channel of the Great Rigolet."

A provision was further made requiring the opening and closing of all of said above-named bridges for the passage of vessels there-through.

The Railroad Company located the line of its road across the channel of the Great Rigolet and at a point south of, or below, the principal entrance of the Pearl river into the Rigolet; and put in the said Rigolet a bridge as required by the said act of Congress and its Louisiana charter; and also constructed across the eastern mouth of Pearl river, not far from its entrance into the Gulf of Mexico, a permanent or stationary bridge. But soon thereafter the said Railroad Company placed in said Pearl river bridge, a draw, having from 34 to 36 feet in the clear.

On the first day of June, 1875, the District Attorney for the Judicial District of Mississippi in which is located the said Railroad bridge, filed his petition for a mandamus against the New Orleans, Mobile and Texas Railroad Company, in the Circuit Court of Hancock county. Said petition alleged, that said Pearl river bridge was a nuisance, and prayed that the said Company should be directed to abate said nuisance, and to construct and maintain, in the central portion of Pearl river, a bridge, which, when open, should give a clear space for the passage of vessels of not less than sixty feet in width (Record pp. 3 and 4). To this petition the Railroad Company filed an answer (Record p. 5), and subsequently it filed its petition for removal into the United States Circuit Court (Record p. 9). The removal was denied, and judgment was entered on the petition for mandamus against the said Railroad Company. (Record, pp. 11 and 12).

From this judgment the Company took an appeal to the Supreme Court of Mississippi where the said judgment was affirmed (Record, p. 16). And the cause was carried by writ of error to this Court, which reversed the judgment of the Supreme Court of Mississippi and issued its mandate directing the removal of said cause. (Record, p. 17, 102 U. S. Rep., 135)

After the removal of said cause, the Railroad Company was, by order of the Court, permitted to withdraw the answer filed in the State Court and to replead. (See Record, pp. 18 and 19).

The Defendant then filed demurrers to the petition (R., p. 19) and without prejudice to its demurrer the Railroad Company also filed an answer. (R., p. 20).

To this answer a general demurrer was filed by the Attorney General, who appeared for the State. (R., p. 24).

The demurrers to the petition were over-ruled. The cause was then submitted on the demurrer to the answer, and the same was sustained. (R., p. 25).

The judgment of the Circuit Court is here assigned as error.

THE PLEADINGS.

The petition for mandamus was based upon that portion of the charter which directed the Railroad Company to place and maintain in the central portion of the channel of Pearl river a

draw-bridge, which, when opened, would give a clear space for the passage of vessels of not less than sixty feet in width; said petition further setting up and declaring that the river was a navigable river by the Common Law and the law of Nations, and that the point at which said Railroad bridge crossed said river was a part of the boundary line between Mississippi and Louisiana, and that neither the State of Mississippi nor the State of Louisiana had a right to obstruct, or authorize others to obstruct, the free navigation of said river. It was claimed that the act of Congress, approved March 1st, 1817, entitled: "An Act to enable the "people of the western part of the Mississippi territory to form "a constitution and State government, and for the admission of "said State into the Union on an equal footing with the original "States," provided, that the Mississippi river and the navigable waters leading into the Gulf of Mexico should be common highways forever free to all inhabitants of said State or citizens of the United States; and that this was a condition and engagement on the part of the United States that the said Pearl river should be forever free to all the inhabitants of the State of Mississippi; and that the construction and maintenance of said bridge was an obstruction to the navigation of said river, causing a permanent and irreparable injury to the State of Mississippi and the citizens thereof, and to the waters of the United States, as well as being a violation of the charter of the said Railroad Company. (R., pp. 2 and 3).

The demurrers to said petition set up, that the petition showed that the construction of said bridge was in conformity with the Railroad Company's charter.

2. That the said structure was a public work, duly authorized by law, and not a nuisance.

3. That the failure to show that the bridge has interfered, or will interfere, with the commerce and navigation of said river to such an extent as to make the maintenance of the same a nuisance.

4. That the petition demanded the construction of a more expensive draw-bridge than is shown to be necessary for the proper navigation of said river.

5. That the facts alleged do not warrant the issue of the writ, as prayed.

6. That the petition requires the erection and maintenance

of a draw-bridge partly within the territory of Louisiana, over which, the State of Mississippi can exercise no power or jurisdiction. (R. pp. 19, 20).

The answer of the Railroad Company showed its incorporation, organization and the extent of its powers under the laws of Alabama; the recognition of said Company by the laws of Mississippi and the grant of the right to exercise its franchises in that State; its authority under its Mississippi charter to construct bridges over the navigable waters of the State, including the Pearl river. The proviso in said charter, that in case the said Company should locate the line of their road across the channel of the Great Rigolet at a point south of, or below, the principal entrance of the Pearl river into the said Rigolet, that said Company should not be required to construct a draw-bridge across any bayou leading into Pearl river or across any small pass or mouth of said river, was also set forth.

It was further shown, that the eastern mouth of Pearl river, where said bridge crosses, is the only mouth which said Railroad does or could cross when located south of the principal entrance of the Pearl river into the Great Rigolet, and is, therefore, the only mouth upon which the proviso in reference to crossing south of the principal entrance could have any operation. It was also shown that the Railroad had been located south of said principal entrance of Pearl river into the Great Rigolet, which relieved said Company from all duty to put a draw-bridge in east Pearl river.

The answer further shows, (Paragraph 9, R. p. 22), that prior to, and at the time of, the passage of said act the said mouth of the Pearl river was of comparative insignificance, commercially speaking, and that the commerce of the river had theretofore, and was then being carried in through the principal entrance of the Pearl river into the Great Rigolet and through the Great Rigolet, either to New Orleans by Lake Ponchartrain or to the Gulf of Mexico; and that the construction of the draw-bridge across said Rigolet, south of the principal entrance thereinto of said Pearl river, left the existing commerce unimpeded. The answer (Paragraph 11, R. p. 23) further sets up the act of Congress and the powers therein granted, and the absence of any requirement that a draw-bridge should be placed in said east Pearl river.

The answer further shows, that there is already a draw in said Pearl river bridge which is adequate for all the wants of the commerce of said river, past, present and prospective, which removes all unnecessary hindrance and impediments of navigation on that stream, and is sufficient to accommodate all vessels which can cross the bar at the mouth of the river. (R. p. 20, par. 12 of Ans.)

The answer also declares in paragraph 13, that the said bridge as originally constructed, and as now maintained, was made under the power and authority granted by the United States and the States of Louisiana and Mississippi,—that the bridge was constructed at great cost, and that the erection of a draw, as prayed for, would necessitate the destruction, in a large part, of its present structure and the erection and maintenance, at great expense, of another bridge, without public nor commercial necessity therefor; and denies the right of the State to interfere with or have said bridge abated, as illegal or a nuisance.

A map is also filed with the answer, showing the geography and topography of the country in the neighborhood of the bridge.

By the Code of Mississippi, sections 1572, 2296, 2297, the Court has judicial knowledge of the terms of all special statutes.

The judgment of the Court was, that a peremptory writ of mandamus should issue to the New Orleans, Mobile and Texas Railroad Company, and the President and Directors thereof, "directing and commanding the said Railroad Company to at once remove the bridge, and in lieu thereof to construct and maintain in the central portion of the channel of said Pearl river, where the said Railroad passes the same, a draw-bridge, which, when open, shall give a clear space to vessels of not less than sixty feet in width, and thereafter to provide that said draw-bridge shall be opened for the passage of any and all vessels seeking to pass through the same, without unnecessary delay; provided, however, that said draw-bridge may be built either in the centre of the channel or in any portion of the territory of Louisiana or of this State of Mississippi, *as may be most convenient for public use.*"

The demurrer filed on behalf of the State to the answer was a general demurrer, alleging that the matters and things contained in the answer were wholly insufficient in law and constituted no valid defence to the petition.

ASSIGNMENTS OF ERROR.

The New Orleans, Mobile and Texas Railroad Company here assigns for error.

1. The judgment of the Court in overruling the Railroad Company's demurrers to the petition for mandamus. (Record p. 25.)

2. The judgment of the Court in sustaining the States' demurrer to the answer of the Railroad Company.

3. The judgment of the Court in ordering and directing the issuance of a peremptory writ of mandamus to the Railroad Company, and to the President and Directors thereof, directing and commanding said Company to at once remove the bridge which they had erected across Pearl river, and in lieu thereof, to construct and maintain in the central portion of said Pearl river, where the said Railroad crosses the same, a draw-bridge, which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width.

4. Such portion of the judgment of the Court as directs the said Railroad Company to provide that the draw-bridge previously ordered to be constructed, should be open to any and all vessels seeking to pass through the same, without unnecessary delay.

5. That portion of the judgment which provides that the said draw-bridge may be built either in the centre of the channel of said Pearl river or in that portion of the same within the territory of the State of Louisiana or of the State of Mississippi, as may be most convenient for public use.

6. That portion of the judgment which orders and direct that said Railroad Company shall pay the cost of the suit to be taxed and that execution should issue therefor.

ARGUMENT.

It being admitted that by the Statutes of Mississippi and Louisiana, and by the act of Congress, the New Orleans Mobile and Texas Railroad Company was authorized to construct and maintain a bridge across the eastern mouth of Pearl river, at the point of its location, the question for us first to consider, is, whether or not, there are any specifications or conditions found

in the terms of any of the grants which have not been complied with, and how far any such requirement is obligatory on the Company. *Second*, Whether said Company can be compelled by mandamus to perform such condition or to comply with such specification. *Third*, Whether, under the pleadings, the Court could properly render the judgment entered for a peremptory writ of mandamus.

I.

In determining whether or not there are any conditions of the several grants which have not been complied with, it will be well first to consider the physical characteristics of PEARL RIVER, and particularly its physical condition and qualities near its mouth. The facts pertaining to this enquiry are either within the judicial knowledge of the Court or are set forth in the admitted averments of the pleadings.

Pearl river is the dividing line between the States of Louisiana and Mississippi for about one hundred miles above its mouth, from thence it runs northwardly into the State of Mississippi. Near its mouth the river branches into two principal mouths, the east branch being the boundary line of Mississippi and called East Pearl river or simply Pearl river, the western branch being called West Pearl river. This West Pearl river again branches into two principal mouths, both of which empty into the Great Rigolet, one near Lake Pontchartrain, and the other further east. These branches of West Pearl river and the *east* branch of Pearl river immediately above its mouth, are connected with the Rigolets, the principal volume of water of all these branches being directed into the Great Rigolet. The *principal* and deepest entrance of the Pearl river into the Great Rigolet, as will be seen by the map on record, and by other coast charts and official surveys made about or near the time of the grant to the Railroad Company (1868) is shown to be the most southerly of all of the entrances of Pearl river into the Great Rigolet, the Great Rigolet itself being the strait which joins the lakes Borgne and Pontchartrain, and might itself be very properly considered the principal entrance of Pearl river to said lakes.

The railroad is located south of the principal entrance of Pearl river into the Great Rigolet, and very close to the point where said Rigolet debouches into Lake Borgne.

The conditions contained in the Mississippi charter (ante p. 2), governing the construction of its road across or along the navigable waters of the State, are, that the Company shall preserve such water course so as not to impair its usefulness and convenience to the public *unnecessarily*. Power is then expressly given to cross any of the waters in the State by bridges, with the proviso, that in the central portion of the channel of PEARL RIVER and other named waters, all located in the State of Mississippi, said Company should construct a draw-bridge, which, when open, should give a clear space for the passage of vessels of not less than sixty feet in width.

By reference to the coast charts it will be seen that in late years the east branch of Pearl river is called simply, Pearl river.

It is very evident that the words Pearl river, as used in the Mississippi statute, meant the main stream above and the eastern branch below the point of juncture of the east and west branches. This is evident from the fact that the State was providing for the streams over which it had control; and from the further provisions of the section which can have application only to the branch which forms the boundary line, if that branch be crossed at all, for it was possible for the Railroad under its charter to have crossed the Pearl river north of the Louisiana line and to have come into New Orleans west of Lake Pontchartrain. But it was not possible to locate from Mobile to New Orleans south of the thirty-first parallel without crossing Pearl river where it constituted the boundary line; and below the point of bifurcation, unless the crossing was below the principal entrance of Pearl river into the Rigolet, it was impossible to cross one without crossing both branches of the river. The subsequent provisions of this section show clearly that in speaking of Pearl river regard was had only to the east branch and the river above.

The mouth of this east branch is the *only mouth of Pearl river within the limits or jurisdiction of the State of Mississippi.* All other branches or mouths lie wholly within the limits of Louisiana.

The Railroad Company did not construct a draw-bridge in this mouth of the Pearl river as *first* required by the Mississippi act, but did build, at great expense, a stationary bridge, and it is now asked to furnish the warrant for its conduct. This, we think, can be done without difficulty.

Immediately following the requirements for a draw-bridge of certain dimensions in the *central portion of Pearl river*, is a *proviso*. Now, what is the office and effect of a proviso? "A proviso," says Bouvier, "is the name of a clause inserted in an act of the "legislature * * * which generally contains a condition that "a certain thing shall or shall not be done in order that an agree- "ment (enactment) contained in another clause shall take effect"; or, to paraphrase it in its application to this case, "it is a clause "inserted in the statute containing a condition that a certain "requirement contained in the next foregoing clause shall not "take effect if the thing is done which is mentioned in the "proviso." In other words, by another and preceding clause, the thing required is a sixty-foot draw in the central portion of the channel of Pearl river, there is no requirement as to any other mouth or branch of said river. The thing previously required, is the thing which is effected and limited by the proviso. The proviso is, "that in case the Company shall locate the line of their "road across the channel of the Rigolet, south of the principal "entrance of Pearl river into the Rigolet, *then* the said Company "shall not be required to construct a draw-bridge across any "bayou leading into said Pearl river or across any small pass or "mouth of said river."

In crossing the Great Rigolet at the point named, the Pearl river could only be crossed at its mouth, as the Road must then be located on the Gulf. But for the proviso, the previous requirements of the statute would have made necessary a draw-bridge of sixty feet in the central portion of the only mouth of Pearl river, large or small, which the Road by that location could cross. To say that the Company must now make such bridge is to give no effect whatever to the proviso as a clause of limitation, or otherwise.

"A proviso differs from an exception. An exception *exempts* "absolutely from the operation of an engagement or an enact- "ment; a proviso defeats their operation, *conditionally*. An ex- "ception takes out of an engagement or enactment something "which would otherwise be part of the subject matter of it; a "proviso avoids them by way of defeasance or excuse." 2 Bouvier Law Dict., Title Proviso.

The argument on the other side is that the exemption is only for a *small* pass or *small* mouth of said river, and that the mouth

in question is not a *small* mouth, but is a large mouth, and the principal mouth. We deny that it is a large mouth of the river as compared with the others; and it is not the principal mouth of the river, speaking in either a physical or commercial sense. It is, however, the only mouth of the river with which the State of Mississippi had, or has anything to do. It is only by repeating the adjective "small" directly in conjunction with the word "mouth," as was done by the Supreme Court of Mississippi, that the other side secure a premise on which to base their argument—with as much right might we make the clause read "any small pass or "(the) mouth of said river."

It may here be pertinently asked, why should the State of Mississippi yield its right to have this draw-bridge in the only mouth of the river within its borders? To which enquiry we will respond by asking, what purpose and reason had the Legislature for inserting the proviso at all? And why should they attach any condition or proviso predicated upon the particular location of the road across the Rigolet which is wholly within the State of Louisiana? We will try and answer both of these questions together, and think the answer to the second furnishes a complete and satisfactory answer to the first. But to do this we will have to recur briefly to what has been said about the physical characteristics, and more particularly to consider the history, extent, condition and habits of the commerce and navigation, of Pearl river at the time of the passage of the Mississippi charter. This is a legitimate undertaking on our part, as it was only for the purpose of protecting this commerce and navigation that any special conditions were placed upon the bridging of this river. These things were succinctly stated in the answer to the petition, the truth of which are admitted by the demurrer of the State and constitute the facts of this case, on that subject, and as stated, are as follows. (Record, p. 22.)

"And defendant further avers, that prior to the passage of the said act of Mississippi, the commerce and traffic of said Pearl river had been always theretofore, and then was being done almost wholly with the city of New Orleans and with places upon the Lake Pontchartrain; and the same was done through the principal entrance of Pearl river into the Rigolets, and thence through the Rigolets and said lake, or through other passes than

the mouth of East Pearl river. That the commerce from points on Pearl river with points on Lake Borgne, could be better done by the said route into the Rigolets and thence into Lake Borgne, than by the mouth of said river, called East Pearl river, the distance being much shorter by the Rigolets, and the water by that route being of sufficient depth to satisfy all the wants of the commerce of said river; and that the traffic if any through said mouth of East Pearl river was inconsiderable in value and amount.

"And defendant further avers and shows, that the commerce of said Pearl river as it had theretofore been, and was at the time of the passage of said statute of Mississippi granting said authority, has not been in any way seriously interfered with, hindered or obstructed. That had the said railroad and bridge been located across the channel of the Rigolets at a point north of or above the principal entrance of the Pearl river into the Rigolets, the commerce of said Pearl river would have been greatly obstructed, if not destroyed, unless a draw-bridge or draw-bridges had been placed in the said Pearl river as well as in the said Rigolets."

The above facts, we think, show that by our construction of the proviso, the purpose of the Legislature is fully met, and the existence of the proviso itself is accounted for. The State of Mississippi was not the creator or incorporator of the Railroad Company. The purpose of her statute was to confer powers upon the existing Company, under restrictions for the protection of the people of the State of Mississippi, for the operation of the railroad in that State. She could not say at what part of the Great Rigolet the road should cross, as that was wholly within the territory of Louisiana. The only positive controlling requirement she could make to protect certainly the commerce of Pearl river and to cover all contingencies of location, was for a draw-bridge on Pearl river. But it was easy enough and safe enough to provide that if the railroad should be so located as to the Rigolets that the commerce of Pearl river would not be interfered with, that the restriction should cease, as being unnecessary, and perhaps unadvisable. That a sufficient draw would, in any event, be placed in the Great Rigolet was a matter of moral certainty, and the construction of a stationary bridge across the Rigolets destroying that great arm of the sea as a highway for the long-established and

immense commerce of the Gulf with the Lakes Pontchartrain and Maurepas and the canals to New Orleans, was a contingency not to be dreamed of or provided against. The contingency of *location* of the crossing of the Rigolets was the important point to be guarded against by Mississippi, there was sufficient assurance that the State of Louisiana, Congress and the commercial interest involved, would adequately protect against any serious imped ment to navigation in that commercial highway.

This Railroad was not local to the State of Mississippi. It was itself a great inter-State Road, a thoroughfare and highway of national importance.

Louisiana was not only interested in the Railroad but had as much interest in the free and unobstructed navigation of the Pearl river as had the State of Mississippi. Not only did its territory border the river for about one hundred miles above its mouth, but, as we have before seen, nearly all of the commerce of that river was done with New Orleans and other places in Louisiana, and doubtless the largest portion of the flotilla navigating that stream, and directly interested in its freedom from obstruction, was owned by citizens of Louisiana.

What did this great State do to protect this commerce and preserve the navigation of this stream? It made, what we say are, provisions identical in effect, though in different and more perspicuous language with those that were adopted by the State of Mississippi. It is evident that the two statutes were intended to dove-tail with each other; and, as a cotemporaneous construction of the Mississippi statute, we think the language of the Louisiana statute of great value. It is true that the Louisiana statute was passed subsequently in point of time, but it is evident that the Road was not projected by piece-meal, that the several statutes were as nearly contemporaneous in date as the vicissitudes of legislation would permit, and that the proviso in the Louisiana act to the effect that the State of Mississippi should concur in the provisions of the act as to Pearl river, was but the reflection of a similar provision in the Mississippi law, and is not of the significance which our opponents seek to place upon it.

We are not left to the Louisiana statute alone for an interested legislative and contemporaneous construction of the Mississippi act, as to the Pearl river bridge. It is true that the act of

Congress does not present an alternative duty in respect to these water courses, as do the statutes of the two States. But the reason for this is found in the facts stated in paragraph eleven of the answer. (Record, p. 23.) The railroad had been already located south of, or below, the principal entrance of Pearl river into the Great Rigolet, before the passage of the act of Congress. By this act a draw-bridge was expressly required in the Great Rigolet, and in all of the other waters in which they had been expressly directed by the statute of Mississippi, excepting in Pearl river. The contingences in which a stationary bridge was allowed in Pearl river by the State statutes had happened, and so to mention Pearl river was not necessary. It is hardly possible that the intelligent committees of Congress would have endorsed a measure likely to impair the commerce of that locality or would have lightly disregarded the expressed wishes of the State of Mississippi in such a matter. It is clear that Congress also put the construction on the statute of Mississippi which we contend for.

The Railroad Company, the State of Louisiana, and the Congress of the United States, all put the same contemporaneous construction on the Mississippi statute, the Railroad Company making large expenditures on the faith of their authority to put a stationary bridge in East Pearl river. In the case of the Union Pacific Railroad Company vs. Hall, 91 United States, 343 (on pp. 351, 352), Mr. Justice Strong said: "It must be conceded that, "in a case where the interpretation is doubtful, the practical con- "struction given to it (the charter) by the parties is of weight."

A point was sought to be made that the act of Congress did not undertake arbitrarily to remove the restrictions put upon the railroad by the States as to these bridges, but recognized other restrictions, not mentioned in the act of Congress; and the following clause is cited to sustain the proposition, viz: "And said "railroad and its bridges aforesaid" (i. e, over the navigable waters of the United States,) "when constructed, completed, and "in use, in accordance with this act and the laws of the several "States through whose territory the same shall pass, shall be "deemed recognized and known as lawful structures and a post- "road, and are hereby declared as such." Taken in connection with the context which legalizes the whole road as well as the

bridges, and declares the same to be a postroad, we do not think the above expressions, or any portion of them warrant the construction placed upon them by our opponents.

Moreover, it will be observed that it is not the laws of Mississippi that are to be regarded, but the laws of the *several States* through which the same may be located, and that the State of Louisiana in no equivocal terms authorizes a stationary bridge in East Pearl river.

But we go one step further and say that the act of Congress was intended to authorize the bridging of all the streams along the route of said railroad with no other limitations as to drawbridges than those specifically mentioned in the act itself.

Congress has full power to authorize the construction of a bridge or other public work in a navigable stream, although the construction of such bridge or work may impair or even destroy the navigability of such stream.

Miller vs. Mayor of New York, 109 *United States,* 385, and cases cited.

When Congress acts in the premises as to the bridging of an inter-State river, its legislation is controlling and exclusive.

Pennsylvania vs. Wheeling Bridge Company. 13 *How.,* 518.

Pennsylvania vs. Wheeling Bridge Company, 18 *How ,* 421.

Clinton Bridge Case, 10 *Wallace,* 454.

Escanaba Company vs. Chicago, 107 *United States,* 678.

And the terms of the act of Congress of March 1, 1817, (3 Unites States at Large, 349), which was relied upon by the State in its petition for mandamus furnishes no obstacle to the obstruction of navigation in Pearl river by act of Congress.

South Carolina vs. Georgia, 93 *United States,* 4.

When Congress acts, as it has done in reference to the bridges of the New Orleans, Mobile and Texas Railroad, it assumes control of *the subject.*

Miller vs. Mayor of New York, 109 *United States,* 385 *(on p.* 397.)

We here quote in this connection from the brief of the learned counsel who represented the plaintiff in error on a former hearing in this Court :

"There are two separate subjects of legislation comprised in the act of Congress, and with distinct aims, though germane to one another. 1st. The corporation is at once, and by the declarations of the act authorized and empowered to construct, build and maintain BRIDGES over and across the navigable waters of the United States, on the route of said railroad between New Orleans and Mobile, for the use of the Company, and the passage of its engines, cars, trains of cars, passengers, mails and merchandise, thereon.

"Were there no other authority than this, we hold that the bridges might be built and maintained. We hold that Mississippi could not hinder nor prevent the construction of the bridges for such an object, under such a license.

"Congress, by this act, assumed a direction that the construction and maintenance of bridges over the navigable waters of the United States, and over the Pearl river forming the boundary of two States, and a part of which is in each State, was necessary and proper:

"1st. For the transportation of the mail over that river, in cars;

"2d. For the transportation of commercial vehicles, passengers and merchandise, from one State to another State;

"3d. It might serve for the defence of the country. In the late war, Congress appropriated the railroads, and extended and built them for military purposes.

"Congress, after empowering and authorizing the Company to construct and build the BRIDGES, then proceeded to say, that the railroad and its bridges when constructed, completed and in use according to this act and the laws of the several States, through whose territory the same shall pass, shall be deemed, recognized and known as lawful structures, and a postroad, and are hereby declared as such.

"We assume as the proper interpretation of this act, that Congress regarded the *bridges* to have existence as lawful structures by their construction under the authority conferred by Congress, and that the railroad was indebted to Mississippi and other States, for all of its faculties. Congress adopted it as a postroad when completed, and declared it to be a postroad.

"When was it, that the bridges became lawful structures, and when was it that the railroad became a postroad? It was when

the road was constructed, completed and in use. The petition of the plaintiff avers maintenance and use of the railroad and bridges since 1870.

"When Congress declares that a railroad, and its bridges constructed under the specific authority of Congress to be lawful structures, and to be recognized as such, and a postroad, then the right and the duty to exercise a conservative control and protection over such structures, seems to be implied.

"An authority to establish a postroad through a wilderness, and to erect bridges as an essential part of the road, is conceded to Congress. If Congress, as an incentive to a corporation to construct, build and maintain the road or bridges for such purposes, declares that they shall be deemed, recognized and known as lawful structures, it follows that the citizens of the United States shall respect them as such, and that the government shall support them as such. The powers to establish postroads, regulate commerce among the States, and to support armies and provide for common defence, were entrusted to Congress without restriction or limit.

"The powers were not to remain dormant, but to be actively employed. A case for that employment is stated in this act.

"It follows that the State authorities cannot denounce and destroy these structures contrary to the will, and in contradiction of the grant of the Congress."

II.

But granting for the sake of argument that the Railroad Company does owe a legal statutory duty to place in the East Pearl river a draw-bridge of the specific dimensions of sixty feet, notwithstanding their present draw-bridge of thirty-four to thirty-six feet is adequate to all of the wants of commerce and removes all serious interference with the navigation of the river, the question still remains: Is this a duty to the State of Mississippi by virtue of the requirements of its charter to the railroad, or does the duty arise from the provisions of the act of Congress? And if the duty arises under the act of Congress, can the performance of that duty be enforced by the State of Mississippi?

We contend that the authorization and regulation of these bridges is a matter of inter-State commerce, and that whenever Congress acts in the matter, their directions are alone to be considered. See cases cited supra.

If we concede that by the terms of the act of Congress, the Railroad Company is required to obey the requirements of the State statute (ante p. 3), and that by a proper construction of that statute the Railroad Company was enjoined to construct a draw of sixty feet in the East Pearl river, still the duty does not arise from the inherent virtue of the State statute, nor is it a duty to the State of Mississippi, but the duty, if any, arises out of the adoption by Congress of the restrictions and specifications of the State statutes, and is a duty thereby owing to the United States. In other words, the specification, restriction and direction as to the sixty-foot draw, if any there be, is derived from the act of Congress, which refers to the State statutes for the further expression of the will of Congress on the subject. The terms of the State statute being effective only because of their adoption as national legislation.

Ex parte Yarborough, 110 *United States,* 651 (*on p* 664).

Can the State of Mississippi on the relation of its law officer invoke the writ of mandamus, which is prerogative in its nature, to enforce a statutory duty arising under the act of Congress? There is no statute of the United States which we are aware of which would confer that right upon the State. Whatever may be the modern doctrine in some of the Courts as to the writ being no longer in all cases a prerogative writ, yet such Courts in the absence of a statute have not gone to the extent of allowing such writs where the duty was to the government, unless by the law officer of the government and in the name of the sovereign.

In this case the only duty to the people or public is, that navigation should not be impaired; the facts show that there is no violation of this duty. The duty to keep a clear opening of sixty feet is due to the government of the United States, by virtue of whose laws alone the duty arises, if any such duty there be. The State of Mississippi cannot undertake to compel the performance of a police duty due to the government of the United States, although the State may have an interest in the result.

Whatever the writ may be by statue in ordinary cases, where

sued out to protect individual interests, it is in this case a prerogative writ sued out in the name of the State.

Revised Code of Miss., 1880, *Sections* 2542 *and* 2551.
Bouvier's Law Dict., Tit. Mandamus.
High's Extraordinary Rem., Sections 1, 431.

In this case the terms of the act of Congress are sought to be enforced, where they are alleged to have referred to and adopted the State statute. The State of Mississippi is not charged with any legal duty to enforce the performance of the act of Congress as to a sixty-foot draw. If we regard any right which she may have to invoke the writ, as predicated on an *interest* in the performance of the duty, the limit of that interest is, that the navigation of the river shall not be destroyed or seriously impeded. The admitted facts show no such condition of affairs, and that there is no necessity for a *sixty*-foot draw as a remedy for any existing evil. If there is any duty on the part of the Railroad Company to put in a *sixty*-foot draw it does not grow out of the necessities of navigation or commerce, but out of the terms of positive statute, in effect, the requirement of an act of Congress and not of the State statute, which while adopted as to its terms by Congress is, nevertheless, superseded as an operative State law by the Congressional enactment.

State vs. Zanesville Turnpike Co., 16 *Ohio St. R.*, 308.

If a State can arrogate to itself the right to compel by mandamus in its own name the performance of one duty enjoined by Congress, it might with equal right undertake to compel the performance of any of the navigation registration or other public laws of Congress where the subject was local in its effect or operation. United States officers might be compelled to perform their respective duties in the several States by this proceeding, and the National banks and other Federal corporations be held to a performance of their legal functions on the relation of any State.

By the 17th Statutes at Large, 509, Congress has provided for the writ of mandamus in the proper Circuit Courts to compel the Pacific Railroad Company to operate its road as required by law. Could the States have undertaken by such proceedings in their own forums to have enforced the provisions of the charter of the Pacific Railroad Company?

III.

The Court should not have rendered the judgment for a peremptory mandamus.

It is apparent that there is grave doubt, to say the least of it, as to whether there exists any such legal duty on the part of the Railroad Company as is claimed by the State. This doubt rests not only upon the want of precision in the statute, but upon the conditions and surroundings of the *locus in quo*, and the circumstances and history of the navigation and the reasons which must have offered themselves to the consideration of and operated upon the legislature of Mississippi, and is evidenced by the contemporaneous construction of the State of Louisiana, the Congress of the United States, the Railroad Company, and even the State of Mississippi itself which for five years (from 1870 to 1875) acquiesced in the maintenance of the bridge in question. The Supreme Court of Mississippi, which was followed by the learned Circuit Judge, had to interpolate the word "small" before the word "mouth" as it appeared in the charter before they could plainly read the duty on the part of the Company which they sought to enjoin.

It is a well settled proposition that mandamus will not lie where there is any doubt as to the existence of the duty sought to be enforced, or where the legal right *in the relator* to have the duty enforced is doubtful. And even where the right is clear and the duty obvious the granting of the writ is not as a matter of course but rests in a wise judicial discretion.

High Extraordinary Remedies, §§ 6, 7, 9, 10 and 20 and 550.

The petition and alternative writ are bad because they seek to compel the Railroad Company to build a draw-bridge partly within the jurisdiction of the State of Louisiana. The territorial limits of Mississippi extend to the centre of the channel of Pearl river and here its right and jurisdiction ceases. This is the *filum aquae*, which has length but not breadth; the prayer of the petition and the mandate of the alternative writ (R. pp. 4 and 5) would require the draw to be one half in the State of Louisiana—which has authorized a stationary bridge at this point.

The petition and alternative writ are defective for another reason. The provision of the Mississippi statute (ante, pp. 2 and

3) and the duty as defined in the petition (R. p. 2) give the Company a discretion, as follows: "And such draw-bridge may be "built in the centre of the channel of said Pearl river, or in that "portion of the same within the territory of the State of Louis- "iana, or of this State, as most convenient for public use." The petition and alternative writ seeks to narrow the alleged legal duty of the Railroad Company and to deprive it of the legal discretion given it by law.

High on Extraordinary Rem., § 539.

The peremptory writ is vicious in that it does not conform strictly to the prayer of the petition and the terms of the alternative writ. (R. p. 25). The Railroad Company has never had opportunity to show cause against the granting of the mandate, as the same is contained in the peremptory writ.

High on Extraordinary Rem., § 548.

Respectfully submitted,

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GAYLORD B. CLARK,
Attorneys.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1883.

N. O. M. & T. R. R. CO.,
Plaintiffs in Error,
vs.
THE STATE OF MISSISSIPPI,
Defendant in Error.

No 382.

EX REL. DISTRICT ATTORNEY, ETC.

BRIEF FOR DEFENDANT IN ERROR.

—BY—

J. Z. GEORGE.

JACKSON, MISS.:
THE STATE LEDGER STEAM PUBLISHING HOUSE
1884.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D., 1883.

N. O., M. & T. R. R. CO.,
Plaintiffs in Error.
vs.
THE STATE OF MISSISSIPPI.
Defendant in Error.

No. 982.

EX. REL. DISTRICT ATTORNEY, ETC.

Brief for Defendant in Error.

—BY—

J. Z. GEORGE.

This is a petition for mandámus, brought in the courts of the State of Mississippi, and afterwards transferred by virtue of the provisions of the act of Congress, approved March 3, 1875, to the Circuit court

of the United States, for the southern district of the State of Mississippi, to compel the New Orleans, Mobile & Texas Railroad Company, plaintiffs in error, to remove the bridge which they have heretofore erected across Pearl river, and in lieu thereof to construct and maintain in the central portion of the channel of said Pearl river, where its railroad crosses the same, a draw-bridge which when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, and thereafter to provide that said draw-bridge shall be opened for the passage of any and all vessels seeking to pass through the same, without unnecessary delay.

To the petition, the plaintiff in error interposed a demurrer and with its demurrer, without prejudice thereto, filed an answer to the merits, to which the defendant in error filed its demurrer.

The court below overruled the demurrer of the plaintiff in error and sustained the demurrer of the defendant and gave judgment accordingly. From this judgment this writ of error is prosecuting by the plaintiff.

A comprehensive statement of the case as made by the pleadings, will be found in the opinion of the circuit judge which is hereto appended.

ARGUMENT FOR DEFENDANT IN ERROR.

This case depends entirely upon the construction of section 3 of the act of the legislature of Mississippi, of February 7th, 1867, which section, so far as it relates to this question, is printed in the exhibit hereto appended.

It was so held by the supreme court of the State, and correctly. See opinion of Judge Campbell in the exhibit hereto appended.

Nothing can be claimed under the act of Congress of March 2, 1868, or against the requirement of the act of the legislature of Mississippi, for the reason that by the very terms of the act of Congress, the road was only to be deemed and recognized as a lawful structure and a post road when it should have become constructed, completed and in use in accordance with that act, *and the laws of the several States through whose territory it should pass.*

It is manifest that the act of Congress was not intended to confer any rights in conflict with the laws of the several States, or in any manner to qualify the requirements imposed by them. On the contrary, by its express terms, it refers to those laws, and itself, requires a compliance with them. Judge Campbell therefore correctly said: "The case turns entirely upon the construction of the act of the legislature of Mississippi."

Does that act require the construction of a draw-bridge as claimed?

This question must be determined by the act itself. It requires the company to construct and maintain a draw-bridge in the central portion of the channel of the Pearl river, of the Bay of St. Louis, of the Bay of Biloxi, and of the East Pascagoula river, and in each of them, which, when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, etc.

The company admit that they have not constructed such a draw-bridge in the channel of Pearl river; but claim that they were justified in not doing so, by virtue of the following proviso: "That in case the company shall locate the line of their road across the channel of the Rigolet, at a point south of and below the principal entrance of Pearl river into the Rigolet, then said company shall not be required to construct a draw-bridge across any bayou leading into Pearl river, or across any small pass or mouth of said river;" they having crossed the Rigolet at a point south of or below the principal entrance of the Pearl river into the Rigolet, the sole question to be determined, is whether by so doing they are released from the requirement, that a bridge should be constructed in the main channel of Pearl river.

The State denies that they are so released; and insists that notwithstanding the proviso above quoted, and the fact that they have built across the Rigolet, at a point south of the principal entrance of the Pearl river, it is their duty to construct a draw-bridge in the central portion of the channel of the Pearl, as stated in the petition. The question comes up on the demurrer of the company to the petition, and on the demurrer of the State to the answer of the company. If the construction contended for by the State be correct, the demurrer to the petition should be overruled and that to the answer sustained.

By referring to the accompanying map, it will be seen that the Pearl river proper, empties directly into Lake Borgne. It will be further seen that it has an

outlet through Little Lake into the Rigolet, and by the Rigolets into Lake Borgne. It will also be seen that there are two outlets from Little Lake into the Rigolet.

Thus there are three routes by which Pearl river may be entered from Lake Borgne; one by passing directly from the Lake into the main channel; another by passing from the Lake into the Rigolets, and thence through Little Lake into the Pearl; and another by passing into the Rigolets from the Lake, and going from the Rigolets by a more northern and circuitous outlet into Little Lake, and thence into Pearl river.

All these routes were, at the time the company was chartered, used by vessels engaged in Pearl river commerce.

While the legislature was willing to charter the company, and that too without imposing any unnecessary restrictions upon them, it was at the same time, careful that no impediment or obstruction should be allowed which could interfere with the commerce of Pearl river. The two entrances through the Rigolets and Little Lake, were through Louisiana territory, (the main channel opening directly into Lake Borgne, being the boundary between Mississippi and Louisiana,) but the citizens of Mississippi were interested in those entrances remaining unobstructed, and the proviso, relied upon by the company was designed to secure that end, and that only, since under all circumstances, the expectation and intention were that the navigation of the main channel should not be interfered with.

An examination of the map will help us to arrive at the meaning of the act. The argument of the company

have been crossed; to wit, the more northern pass from Little Lake into the Rigolets, and unless a draw-bridge was put in that pass, it could not be used at all. The whole purpose, it will then be seen, was to secure to commerce the three entrances into Pearl river, above mentioned.

That the Legislature did not intend to release the company from putting the draw-bridge in the main channel of Pearl river, by the provision under discussion, is manifest by the portion of section two immediately following it.

It is as follows: "It is also provided that such part of this section as relates to Pearl river, if the line of the road shall be located across the said river at a point where it constitutes the boundary line between the State of Mississippi, and the State of Louisiana, shall not take effect until the State of Louisiana has consented to, and authorized the same, or said company has built such a bridge across said Pearl river, for its said railroad, as shall be in accordance with said section, and also with any authority or power granted to the said company by the said State of Louisiana in the premises, and such draw-bridge may be built in the center of the channel of said Pearl river, or in that portion of the same within the territory of the State of Louisiana or of this State, as most convenient for public use."

Ti is requirement comes in section 2, immediately after the proviso relied upon, and is wholly inconsistant with the construction contended for by the company.

An inspection of the map will show that it was almost impossible for the road to cross Pearl river, except at a point where it constitutes the boundary line between the two States, and that was known to the Legislature of Mississippi.

It did cross the river at such a point as a matter of fact, and until the company have built such a draw-bridge in the channel of the river as is specifically described in the previous portion of section two, nothing contained in said section takes effect, for it is so written.

The right to cross the river at all, does not take effect until a sixty foot draw-bridge is built.

For a further discussion of this question, the Court is refered to the opinion of the Supreme Court delivered by Judge Campbell, and to the opinion of the Circuit court delivered by Judge Hill. If this construction be sound, of course the Court cannot take into consideration the question as to whether the necesaity of commerce requires that the bridge should be built, or as to whether the bridge already is sufficient.

If the charter requires it to be built, the Court must so decree.

Respectfully,

J. Z. GEORGE.

APPENDIX A.

OPINION OF SUPREME COURT OF MISSISSIPPI.

BY CAMPBELL, J.

The refusal of the Circuit Judge to remove this cause to the Circuit court of the United States for the southern district of Mississippi on the application of plaintiffs in error was correct, because the case was not such an one as by the 2d section of the act of Congress, approved March 3, 1875, to regulate the removal of causes from State courts, is removable. The demurrer to the answer to the petition for *mandamus* was properly sustained. The answer presents the whole case of the company, and calls for the interpretation of the acts of the Legislature to determine whether it requires the construction of a draw-bridge over the channel of Pearl river. It is manifest that the intention of the Legislature in the act refered to, was to require the construction of a draw-bridge in the central portion of the channel of Pearl river, or on the Louisiana side of the stream

if the consent of that State should be obtained to that. The proviso "that in case the company shall locate the line of their road across the channel of the Rigolet at a point south of or below the principle entrance of Pearl river into the Rigolet, then the said company shall not be required to construct a draw-bridge across any bayou leading into Pearl river or across any small pass, or mouth of said river," was not intended to have the effect to permit a solid bridge without a draw across the channel of Pearl river, above the point of its emptyings in Lake Borgne. The purpose to prevent the obstruction to the navigation of Pearl river is manifest throughout the act.

The proviso above recited has the effect to relieve from making a draw-bridge on the condition specified "across any bayou" leading into Pearl river or across any *small pass* or *mouth* of said river, but was not intended to relieve from the necessity of a draw-bridge across the main channel of Pearl river where it is the boundary line between the States of Mississippi and Louisiana. The maps show that Pearl river may be entered from Lake Borgne and from the Rigolets. The main channel seems to be that emptying into Lake Borgne and constituting the boundary line between Mississippi and Louisiana. The entrance from the Rigolets is through the territory of Louisiana, but Mississippi is interested in the navigation of the river Pearl, through all its connections with the Gulf of Mexico, or adjacent waters, and in consenting to the construction of the road of this company through her territory

the State of Mississippi gave her consent on the terms prescribed by the act.

It is first provided that said company shall preserve any water-course, which its said railroad may so pass upon, along, intersect, touch or cross so as not to impair its usefulness to the public. There is the specific provision for a draw-bridge in the central portion of the channel of the Pearl river, and other waters of Mississippi. Then follows the proviso above copied intended to relieve from the necessity of constructing and maintaining a draw-bridge across any mere bayou leading into Pearl river, or across any small pass or small mouth of said river, if the line of the railroad should be constructed across the channel of the Rigolet below the principal entrance of Pearl river into the Rigolet. The act has referance to both the channels through which Pearl river communicates with the waters of the lakes. A draw-bridge is absolutely required across the channel of Pearl river where it divides Mississippi and Louisiana. One is not required across any bayou, small pass or mouth of said river, if the line is located across the Rigolet below the principal entrance of Pearl river into the Rigolets. The act of Congress, approved March 2, 1863 entitled "an act to establish and declare the railroad and bridges of the New Orleans, Mobile and Chattanooga railroad company as hereafter constructed a post-road and for other purposes, authorizes the company to construct bridges across the navigable waters of the United States; and provides that said railroad and its bridges aforesaid, when constructed, completed and in use in

accordance with this act *and the laws of the several States* through whose territory the same shall pass, shall be deemed, recognized and known as lawfull structures and a post-road. The case turns entirely upon the construction of the act of the Legislature of Mississidpi, and in this opinion we have announced what we regard as its proper construction.

The judgement of the Circuit Judge in awarding a peremptory mandamus is affirmed.

CAMPBELL.

I, OLIVER CLIFTON, Clerk of the Supreme Court of Mississippi, do hereby certify the foregoing to be a true copy of the opinion of said Court delivered in the cause hereinbefore stated, as the same appears of record in my office.

In Testimony Whereof, I hereunto set my hand and the seal of said Court, at office at Jackson, this 9th day of April, 1884.

[SEAL.]

OLIVER CLIFTON, Clerk.

By C. C. CAMPBELL, Deputy Clerk.

APPENDIX B.

OPINION OF THE CIRCUIT COURT OF THE U. S., BY JUDGE R. A. HILL.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, NOVEMBER TERM, 1882.

THE STATE OF MISSISSIPPI,
vs.
THE NEW ORLEANS, MOBILE & TEXAS R. R. Co.

This is a petition for a writ of mandamus to compel the defendant to construct and maintain in the central portion of Pearl river where said railroad crosses the same, a draw-bridge, which when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, and at all times thereafter to provide that the same shall be open for the passage of any

and all vessels seeking to pass through the same, without unnecessary delay. The petition among other things avers that by the terms of the charter of the New Orleans, Mobile and Texas Railroad Company, or rather by the provisions of the act of the legislature of the State of Mississippi authorizing and permitting its construction and operation through said State, it is conditioned that said company should, whenever the said railroad might cross Pearl river in this State, erect and maintain a draw-bridge of sufficient width to permit vessels sixty feet in width to pass and repass without unnecessary detention; that said company has disregarded the provisions and violated the conditions of said statute and has constructed its road across said river without the erection of the required draw-bridge and has thereby thrown an obstacle in the way of commerce on said river, and committed a nuisance most detrimental to the interest of the citizens of this State. The petition concludes with the prayer that the said nuisance be abated and the defendant be required to construct said draw-bridge and maintain the same as provided by said statute. The writ was awarded in accordance with the prayer and the case is now in this court by removal from the honorable circuit court of Hancock county.

To the petition the defendant has interposed its demurrer and with its demurrer, without prejudice thereunto has filed its answer to the merits, to which the State has filed its demurrer. As the answer and demurrer thereunto more fully present the facts and and issues for decision, the demurrer to the petition

will be overruled, and that to the answer considered.

The answer admits the construction of said railroad across Pearl river and admits that the draw-bridge where said railroad crosses said river, is not of sufficient width to permit vessels of sixty feet in width to pass, but avers that the defendant did erect and has maintained a bridge of said river with a draw of from thirty four to thirty six feet. The answer denies that the defendant was required to construct any draw-bridge at said point and avers that in any case the one already constructed is sufficient for all purposes of commerce, present or prospective. The answer further relies for a defense to this proceeding upon the act of Congress creating defendants' said railroad, a post road.

This is all that need be stated to an understanding of the questions presented The act of the Legislature of this State authorizing the construction of defendants' railroad after various provisions stipulated as follows:

"*Provided however* that in the central portion of the channel of the Pearl river of the Bay of St. Louis, of the Bay of Biloxi and of the East Pascagoula river, and in each of them, said company shall construct and maintain a draw-bridge which when open shall give a clear space for the passage of vessels of not less than sixty feet in width, and said company after the construction of said draw-bridges, shall at all times thereafter provide that said draw-bridges shall be opened for the passage of any and all vessels seeking to pass through the same without unnecessary delay; *Provided however*: That in case the company shall locate the

line of their road across the channel of the Rigolet, at a point south of or below the principal entrance of Pearl river into the Rigolets, then the said company shall not be required to construct a draw-bridge across any bayou leading into Pearl river, or across any small pass or mouth of said river." It is contended by Counsel for defendant, that the line of defendants' road having been located at a point south of or below the principal entrance of Pearl river into the Rigolets, the defendant was not therefore required to construct a draw-bridge in the channel of the Pearl river. To determine the correctness of this proposition, we must give a construction to this provision of the statue.

I am satisfied that the Legislature designed that the bridge should be erected across the main or East Pearl river, and in the event the line of the road should be located at a point south of or below the 'principal entrance of Pearl river into the Rigolets, then the company should not be required to erect 'such bridges across any small pass or any small mouth of said river, the words "small pass or mouth of said ri er" only embracing small bodies of water communicating with the main body over which the line of the road might pass. I am further satisfied that the construction of the bridge as provided for in the act of the Legislature before referred to, was a condition precedent to the privelege granted the company to cross Pearl river, and that the placing of the bridge across the river without the draw as required, created an obstruction to the navigation of the river at that point, in violation of the terms as well as the spirit of the act.

The State had the right to impose any conditions it saw proper; the Legislature, the people in their representative capacity, being the sole judge as to what should be granted and what reserved for the benefit whether real or fancied, of those represented by it Therefore, the court cannot consider whether the interests of the citizens of the State will be prejudiced or promoted by the enforcement of this provision of the statue. As a circumstance throwing light on the intention of the Legislature, it is urged by defendant's counsel, that previous to and at the time of the passage of the act of incorporating all the commerce upon Pearl river, made its way to New Orleans through channels west of the mouth of the river; but we must presume that the Legislature looked to the future development of the county lying on this stream, extending as it does far into the interior of the State, and especially regarded the immense forests of pine and other lumbers contiguous to the river and its tributaries, which constitute the chief lumber supply of the State, and now finds its way not only to New Orleans, but to almost every part of the inhabited globe, nor can it be presumed that the Legislature was ignorant of the efforts then being made, and those in contemplation to deepen the passage for vessels landing on the the coasts, so as to bring about an interchange of commodities between us and the world.

I am satisfied that the act of Congress in relation to defendant's road and the privilege granted to it, was not intended to interfere with any of the relations between the State and the company. Congress required the

company to construct draw-bridges over East Pascagoula river, and the Bays of Biloxi and St. Louis sufficient for the passage of vessels eighty feet in width. These being navigable waters, Congress had the right to impose any restrictions it saw proper, and as a matter of fact the restrictions imposed as regards these waters, were more stringent than those imposed by the State. It might have imposed the same restrictions as to Pearl river, but doubtless it deemed those imposed by the State sufficient, or as to this river, was willing to leave the question to the Legislature of the State.

The act of Congress further provides that the privileges thereby conferred, shall not go into effect until the road is constructed, completed and in use in accordance with the laws of the States through which the same passes. I am satisfied that the answer presents no defense to the petition. Therefore the demurrer to the answer must be sustained and the relief be granted.

R. A. HILL.

I hereby certify that the above is a true and correct transcript of the opinion of the court delivered in said cause, as the same appears on file in my office.

Given under my hand and the seal of said court this 6th day of December, 1882.

[SEAL.]

J. M. McKEE, Clerk.

APPENDIX C.

ACT OF THE LEGISLATURE.

An act in relation to the New Orleans, Mobile & Chattanooga Railroad Company, a corporation of the State of Alabama, and authorizing and empowering said company to exercise and enjoy its corporate powers and franchises in the State of Mississippi.

* * * * * * * * * * * * *

SEC. 2. Be it further enacted *

Provided, however, That in the central portion of the channel of the Pearl river, of the Bay of St. Louis, of the Bay of Biloxi and of the East Pascagoola river, and in each of them, said company shall construct and maintain a draw-bridge, which when open, shall give a clear space for the passage of vessels of not less than sixty feet in width, and said company after the construction of the said draw-bridge, shall at all times thereafter, provided that said draw-bridges shall be open for the passage of any and all vessels seeking to

pass through the same without unnecessary delay; *Provided however*. That in case the company shall locate the line of their road across the channel of the Rigolet, at a point south of, or below the principal entrance of Pearl river into the Rigolet, then the said company shall not be required to construct a draw-bridge across any bayou leading into Pearl river, or across any small pass or mouth of said river. It is also provided that such part of this section as relates to Pearl river, if the line of the road shall be located across the said river at a point where it constitutes the boundary line between the State of Mississippi and the State of Louisiana, shall not take effect until the State of Louisiana has consented to, and authorized the same, or said company have built such a bridge across said Pearl river, for its said railroad, as shall be in accordance with this section, and also with any authority or power granted to said company by the State of Louisiana in the premises, and such draw-bridge may be built in the centre of the channel of said Pearl river, or in that portion of the same within the territory of the State of Louisiana or of this State, as most convenient for public use.